90-1803

No.

Supreme Court, U.S.
FILED
MAY 22 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAUL A. BILZERIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

ARTHUR F. MATHEWS *
STEPHEN H. SACHS
LOUIS R. COHEN
JOSEPH K. BRENNER
W. HARDY CALLCOTT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Petitioner

* Counsel of Record

May 22, 1991

QUESTIONS PRESENTED

1. Whether a defendant who does not assert reliance on counsel or disclose communications with counsel may testify to his lack of criminal intent only at the price of waiving his attorney-client privilege.

2. Whether, in order to convict a defendant under 18 U.S.C. § 1001, the general false statements statute, the alleged false statement or omission must be material to the government.

3. Whether, in a case involving alleged misstatements and omissions in reports required to be filed under the Securities Exchange Act of 1934, the prosecution may circumvent the materiality requirement for criminal false filing prosecutions under that statute by bringing its charges under 18 U.S.C. § 1001.

4. Whether the prosecution may charge a defendant under the conspiracy to "defraud" clause of 18 U.S.C. § 371 when the alleged conduct is covered by the conspiracy to commit an "offense" clause of Section 371.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	8
I. THE COURT SHOULD RESOLVE A CONFLICT BETWEEN THE SECOND CIRCUIT AND THE D.C. CIRCUIT CONCERNING WHETHER A DEFENDANT MAY TESTIFY TO HIS LACK OF CRIMINAL INTENT WITHOUT WAIVING HIS ATTORNEY-CLIENT PRIVILEGE	8
II. THE COURT SHOULD RESOLVE A CONFLICT BETWEEN THE SECOND CIRCUIT AND ALL OTHER CIRCUITS CONCERNING THE REQUIREMENT OF MATERIALITY UNDER 18 U.S.C. § 1001	15
III. THE COURT SHOULD DETERMINE WHETHER THE PROSECUTION MAY UTILIZE 18 U.S.C. § 1001 TO CIRCUMVENT THE SECURITIES EXCHANGE ACT REQUIREMENT OF MATERIALITY	18
IV. THE COURT SHOULD RESOLVE A CONFLICT BETWEEN THE SECOND CIRCUIT AND THE SIXTH CIRCUIT CONCERNING THE SCOPE OF THE CONSPIRACY TO "DEFRAUD" CLAUSE OF 18 U.S.C. § 371	21
CONCLUSION	25

TABLE OF CONTENTS—Continued

APPENDIX Page

COURT OF APPEALS OPINION 1a

DISTRICT COURT MEMORANDUM OPINION.... 37a

COURT OF APPEALS ORDER DENYING REHEARING 51a

STATUTES AND REGULATIONS INVOLVED.... 53a

TABLE OF AUTHORITIES

Cases:	Page
Aaron v. SEC, 446 U.S. 680 (1980)	5
Allstate Insurance Co. v. James, 845 F.2d 315 (11th Cir. 1988)	11
Basic, Inc. v. Levinson, 485 U.S. 224 (1988)	19
Biller v. Lopes, 834 F.2d 41 (2d Cir. 1987)	13
Dennis v. United States, 384 U.S. 855 (1966)	23
Grunewald v. United States, 353 U.S. 391 (1957)	23
Hunt v. Blackburn, 128 U.S. 464 (1888)	14
Ingram v. United States, 360 U.S. 672 (1959)	5
In re von Bulow, 828 F.2d 94 (2d Cir. 1987)	10, 12
In re Winship, 397 U.S. 358 (1970)	17
Kungys v. United States, 485 U.S. 759 (1988)	18
Lorenz v. Valley Forge Insurance Co., 815 F.2d 1095 (7th Cir. 1987)	9
Luce v. United States, 469 U.S. 38 (1984)	7, 12
Parker v. Prudential Insurance Co., 900 F.2d 772 (4th Cir. 1990)	11
Rewis v. United States, 401 U.S. 808 (1971)	23
Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975)	3, 19
SEC v. Bilzerian, No. 89-1854 (SSH) (D.D.C. April 8, 1991)	7
Tanner v. United States, 483 U.S. 107 (1987)	23
Travis v. United States, 364 U.S. 631 (1961)	18
TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)	19
United Brotherhood of Carpenters & Joiners v. United States, 330 U.S. 395 (1947)	17
United States ex rel. Adkins v. Greer, 791 F.2d 590 (7th Cir.), *cert. denied*, 479 U.S. 989 (1986)	13
United States v. Abadi, 706 F.2d 178 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)	17
United States v. Bryant, 770 F.2d 1283 (5th Cir. 1985), *cert. denied*, 475 U.S. 1030 (1986)	17
United States v. Bullock, 857 F.2d 367 (7th Cir. 1988)	17
United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 19 (1987)	19

TABLE OF AUTHORITIES—Continued

Page

United States v. Clark, 918 F.2d 843 (9th Cir. 1990) 16
United States v. Corsino, 812 F.2d 26 (1st Cir. 1987) 17
United States v. Daily, 921 F.2d 994 (10th Cir. 1990) 17
United States v. Elkin, 731 F.2d 1005 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984) 16, 17, 20
United States v. Flake, 746 F.2d 535 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225 (1985) 16
United States v. Gibson, 881 F.2d 318 (6th Cir. 1989) 24
United States v. Gillock, 445 U.S. 360 (1980) 12
United States v. Greber, 760 F.2d 68 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985) 17
United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986) 17
United States v. Klein, 124 F. Supp. 476 (S.D. N.Y. 1954), *aff'd*, 247 F.2d 908 (2d Cir. 1957) 22
United States v. Larm, 824 F.2d 780 (9th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988) 16
United States v. Mackey, 405 F. Supp. 854 (E.D. N.Y. 1975) 11
United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965) 17
United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 17
United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989) ..... *passim*
United States v. Nobles, 422 U.S. 225 (1957) 11
United States v. Norris, 749 F.2d 1116 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985) 17
United States v. Reynolds, 919 F.2d 435 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1402 (1991) 21, 24
United States v. Richmond, 700 F.2d 1183 (8th Cir. 1983) 17
United States v. Rodgers, 466 U.S. 475 (1984) 5, 20
United States v. Silver, 235 F.2d 375 (2d Cir.), *cert. denied*, 352 U.S. 880 (1956) 17

TABLE OF AUTHORITIES—Continued

Page

United States v. Smith, 778 F.2d 925 (2d Cir. 1985) 10
United States v. Valdez, 594 F.2d 725 (9th Cir. 1979) 16
United States v. Vazquez, 319 F.2d 381 (3d Cir. 1963) 22
United States v. White, 765 F.2d 1469 (11th Cir. 1985) 17
United States v. White, 887 F.2d 267 (D.C. Cir. 1989) ..... *passim*
United States v. Zolin, 109 S. Ct. 2619 (1989) 14
Upjohn Co. v. United States, 449 U.S. 383 (1981) .. 12, 13, 14, 15
Ward v. Succession of Freeman, 854 F.2d 780 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989) 9
Wylie v. Marley Co., 891 F.2d 1463 (10th Cir. 1989) 11

Statutes:

15 U.S.C. § 78j(b) 2, 4, 6, 20
15 U.S.C. § 78m(d) 2, 3, 4, 15
15 U.S.C. § 78n(d) 2, 3, 4, 15
15 U.S.C. § 78ff(a) 15, 19, 20, 21
18 U.S.C. § 371 ..... *passim*
18 U.S.C. § 1001 ..... *passim*
28 U.S.C. § 1254 2
Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (1934) 19
Pub. L. No. 73-394, ch. 57, 48 Stat. 996 (1934) 19

Rules and Regulations:

17 C.F.R. § 240.10b-5 ..... *passim*
Proposed Fed. R. Evid. 513(b) 11

Other Authorities:

ALI, *Restatement of the Law Governing Lawyers* (Tent. Draft No. 2, 1989) 9
American Bar Ass'n, *The Attorney-Client Privilege and the Work-Product Doctrine* (2d ed. 1989) 9

TABLE OF AUTHORITIES—Continued

	Page
Developments in the Law: Privileged Communications, 98 Harv. L. Rev. 1450 (1985)	10
Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions* (1990)	16
Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959)	22
McCormick on Evidence (E. Cleary 3d ed. 1984)	14
Sand, *et al.*, *Modern Federal Jury Instructions* (1991)	10, 16
J. Weinstein & M. Berger, *Weinstein's Evidence* (1990)	12
J. Wigmore, *Wigmore on Evidence* (McNaughton rev. 1961)	14
C. Wolfram, *Modern Legal Ethics* (1986)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No.

PAUL A. BILZERIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Paul A. Bilzerian respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 926 F.2d 1285 and is reprinted in the Appendix at pages 1a-36a. The memorandum opinion of the United States District Court for the Southern District of New York is unreported and is reprinted in the Appendix at pages 37a-50a.

JURISDICTION

The Court of Appeals issued its judgment and opinion on January 3, 1991. Petitioner filed a timely motion for rehearing, which was denied by the Court of Appeals on February 22, 1991. App. at 51a-52a. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are: 15 U.S.C. §§ 78j(b), 78m(d), 78n(d), 78ff(a); 18 U.S.C. §§ 371, 1001; and 17 C.F.R. § 240.10b-5. These provisions are reprinted in the Appendix at pages 53a-61a.

STATEMENT

Petitioner was charged with making misstatements and omissions in reports required by Sections 13(d) and 14(d) of the Securities Exchange Act of 1934 ("1934 Act"). However, he was not prosecuted under these sections of the 1934 Act, which bar only "material" misstatements and omissions in such reports. Rather, he was prosecuted under three general provisions, each of which was held below to permit conviction without *any* proof of materiality: 18 U.S.C. § 1001, the general false statements statute, which the Second Circuit (in conflict with all other circuits) construes as not requiring that an alleged false statement be "material" in any respect; Section 10(b) of the 1934 Act, the general anti-fraud provision; and 18 U.S.C. § 371, the general conspiracy statute.

This was the first criminal prosecution based on alleged misstatements and omissions in Section 13(d) and 14(d) reports. Although one element of each crime charged is criminal intent, when petitioner took the stand and sought (without invoking reliance on counsel) to deny such intent and explain his conduct, the prosecution obtained a ruling (sustained by the Second Circuit in a decision that conflicts with an earlier decision of the D.C. Circuit) that such testimony would waive

his attorney-client privilege. Petitioner has thus been convicted and sentenced to four years in prison (i) for alleged misstatements in reports filed under a statute that requires disclosure of "material" facts, without any requirement that materiality be proved or found; and (ii) without being able (without sacrificing his attorney-client privilege) to testify concerning his lack of the criminal intent that was an element of each crime with which he was charged.

Indictment

Sections 13(d) and 14(d) of the 1934 Act (15 U.S.C. §§ 78m(d), 78n(d)) require the filing of reports concerning the stock holdings and intentions of, respectively, any person holding five percent or more of the stock of a publicly held company and any person making a tender offer for the stock of a publicly held company. The two sections, and Securities and Exchange Commission regulations thereunder, are part of a complex statutory and regulatory scheme designed to provide investors with adequate information on which to base their investment decisions. *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975).

During 1985 and 1986, petitioner was a private investor who participated in attempted acquisitions of two publicly held companies (Cluett, Peabody & Co., Inc. and Hammermill Paper Company) and engaged in transactions in the securities of other companies. The indictment alleged that, in connection with Cluett and Hammermill, petitioner made misstatements or omissions in certain reports required to be filed under Sections 13(d) and 14(d). The alleged misstatements related principally to the sources of financing for and the terms of petitioner's securities purchases. App. at 3a-5a. The alleged omissions related principally to a failure to disclose that two Section 13(d) reports should have been filed earlier than they were—two business days earlier for one report and three weeks earlier for another—because of alleged

arrangements by which a broker-dealer would "accumulate" stock on petitioner's behalf. App. at 4a-5a.

Although alleging that these misstatements and omissions were "unlawful," the indictment did not charge petitioner with violating Section 13(d) or Section 14(d). The prosecution charged him with five counts of violating 18 U.S.C. § 1001, the general false statements statute. App. at 4a-5a. As a result, although the 1934 Act provides criminal penalties only for *material* misstatements or omissions in Section 13(d) and 14(d) reports, the Section 1001 charges permitted conviction (in the Second Circuit) without proof that the alleged false statements were material in any respect.

In addition to the Section 1001 counts, the Cluett and Hammermill charges also included two counts of "fraud" in violation of Section 10(b) of the 1934 Act (15 U.S.C. § 78j(b)) and SEC Rule 10b-5 (17 C.F.R. § 240.10b-5), and one count under the general conspiracy statute, 18 U.S.C. § 371. App. at 4a-5a. The Section 371 charge was that petitioner engaged in a conspiracy with employees of the broker-dealer to commit offenses against the United States (violations of Section 13(d), certain SEC broker-dealer recordkeeping regulations, and regulations governing extensions of margin credit) and, based on the same alleged conduct, a conspiracy to defraud an agency of the United States (the SEC).

The final charge in the indictment, which involved transactions in the securities of two other companies (H.H. Robertson Company and Armco, Inc.), was also brought under Section 371. This allegation was that petitioner conspired with employees of the broker-dealer to commit offenses (Section 1001, broker-dealer recordkeeping regulations, and margin credit regulations) and defraud agencies of the government (the SEC and IRS) by agreeing to sell stock to the broker-dealer on the alleged understanding that petitioner would repurchase it at a later date. App. at 5a-6a.

Trial

In the district court, petitioner moved to dismiss the Section 1001 charges on the ground that Congress did not intend Section 1001 to reach misstatements or omissions in reports filed under the 1934 Act. Although the prosecution conceded at trial that no case had ever applied Section 1001 to such filings, the court denied the motion. Petitioner also unsuccessfully contested the propriety of charging him under the Section 371 "defraud" clause for conduct covered by the Section 371 "offense" clause.

Petitioner testified in his own defense at trial. He had intended, as part of that testimony, to deny that he acted with criminal intent in filing the allegedly false Section 13(d) and 14(d) reports.[1] However, because the prosecution had introduced evidence during its case-in-chief that petitioner had consulted with counsel in connection with the transactions at issue, App. at 39a, petitioner made a proffer of his testimony and sought an *in limine* ruling that the testimony would not waive his attorney-client privilege. The proffer included the representation that his testimony would not make any reference to counsel and a stipulation that he would not argue reliance on counsel as a defense.[2] App. at 8a.

The district court denied the motion, ruling that, if petitioner testified that he lacked criminal intent, his testimony would waive the privilege, permitting the pros-

---

[1] Intent was an element of all of the violations with which petitioner was charged: intent to defraud investors under Section 10(b) and Rule 10b-5, *Aaron v. SEC*, 446 U.S. 680, 695 (1980), intent to commit an offense or to defraud the government under Section 371, *Ingram v. United States*, 360 U.S. 672, 678 (1959), or intent to make a false statement under Section 1001, *United States v. Rodgers*, 466 U.S. 475, 483 (1984).

[2] The record in this case indicates that petitioner and his former counsel became involved in bitter litigation over attorneys' fees and that petitioner substantially prevailed in that dispute at trial. Tr. 2406-07.

ecution to cross-examine him concerning privileged communications (and presumably to call his former counsel as witnesses at trial). App. at 37a-38a. The court said that the privileged information would be "relevant" on the issue of his good faith. App. at 39a. Petitioner then proffered testimony about the steps he took in structuring his acquisition attempts—a central part of his defense that his filings were not in fact misleading or improper—but the court ruled that such factual testimony would also waive the privilege. In response to these rulings, petitioner drastically curtailed his direct testimony. On cross-examination, the prosecution confronted petitioner with alleged inconsistencies between his direct testimony and prior administrative testimony to the SEC; petitioner sought on redirect examination to explain or put into context the alleged inconsistencies. The district court ruled, however, that explaining the administrative testimony, or introducing clarifying portions of that testimony, would waive the privilege if the explanations or clarifications contained denials of criminal intent or factual explanations of the transactions. App. at 12a; Tr. at 2418-24, 2908-10, 2946-49.

Petitioner sought an instruction that, in order to convict for a false statement or omission under Section 1001, the jury must find that the false statement or omission was material to the government. Based on Second Circuit precedent, the trial court rejected the instruction and ruled that materiality was not an element of the false statements branch of Section 1001. App. at 24a; Tr. at 3138.

The jury found petitioner guilty on nine counts: five counts under Section 1001, two counts under Section 10(b) and Rule 10b-5, and two counts under Section 371. The court sentenced him to four years in prison and a $1.5 million fine.[3]

---

[3] The court imposed concurrent four-year prison sentences on six counts (two under Section 1001, two under Section 10(b) and Rule 10b-5, and two under Section 371), and separate $250,000

Appeal

A divided panel of the Second Circuit affirmed. With respect to the attorney-client privilege issue, petitioner relied principally on *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989), which held that a defendant does not waive the privilege by denying the prosecution's allegation of criminal intent. The Second Circuit, citing *Luce v. United States*, 469 U.S. 38 (1984), concluded that *White* was factually distinguishable. App. at 10a-12a.

With respect to the Section 1001 charges, the panel majority affirmed the convictions. App. at 23a-27a. Judge Winter dissented from this holding, reasoning that Congress did not intend Section 1001 to cover misstatements or omissions in reports required to be filed under the 1934 Act. App. at 35a-36a. The panel also ruled that an alleged false statement need not be material to violate Section 1001, rejecting the position of every other circuit on that issue. App. at 24a.

With respect to the Section 371 charges, petitioner relied principally on *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), which held that the prosecution may not charge a defendant under the "defraud" clause for conduct that is covered by the "offense" clause. Relying on its own precedent, however, the Second Circuit rejected the Sixth Circuit's holding. App. at 28a-29a.

---

fines on each of those counts. Reversal on the first question presented in this petition (attorney-client privilege) would go to all counts on which sentence was imposed. Reversal on any of the other three questions presented in this petition would eliminate portions of the $1.5 million fine imposed by the trial court. Reversal would also undermine a permanent injunction (based solely on the criminal conviction) entered against petitioner in a related civil proceeding. *See SEC v. Bilzerian*, No. 89-1854 (SSH) (D.D.C. April 8, 1991).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE A CONFLICT BETWEEN THE SECOND CIRCUIT AND THE D.C. CIRCUIT CONCERNING WHETHER A DEFENDANT MAY TESTIFY TO HIS LACK OF CRIMINAL INTENT WITHOUT WAIVING HIS ATTORNEY-CLIENT PRIVILEGE

Acknowledging that criminal intent is "an essential element of the crime charged," App. at 10a, the Second Circuit nevertheless held that if petitioner had testified that he acted without criminal intent, he would have waived his attorney-client privilege, allowing prosecutors to cross-examine him with respect to his conversations with counsel (and presumably to examine his former counsel as well). The court reasoned that such testimony would "put his knowledge of the law and the basis for his understanding of what the law required in issue." *Id.* The court reached this result notwithstanding the fact that petitioner had expressly disclaimed a defense of reliance on counsel (offering to stipulate to a jury instruction to that effect) and had represented that his testimony would not have indicated even that he consulted with counsel.

This ruling conflicts with the holding of the District of Columbia Circuit in *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989). There, a unanimous panel reversed the defendant's conviction, rejecting as "scarcely tenable" the notion that a defendant waives his attorney-client privilege by denying the prosecution's allegation of criminal intent and asserting that he acted in good faith:

> A rule thus forfeiting the privilege upon denial of *mens rea* would deter individuals from consulting with their lawyers to ascertain the legality of contemplated actions; it would therefore undermine the animating purpose of the privilege.
>
> The district court apparently equated White's denial of criminal intent with a reliance-on-advice-of-coun-

> sel defense, which would have waived the privilege. Reliance on advice of counsel is an affirmative defense, an assertion more positive and specific than a general denial of criminal intent. . . . White carefully refrained from relying on any statements of counsel and expressly disavowed any intent to rely on an advice-of-counsel defense. . . .
>
> Intent is an element of the offense the government must prove. It was White's constitutional right to put the government to its proof on all the elements of the offense. . . . To penalize him for exercising this right by holding that he waived his attorney-client privilege would cut short both the privilege and the right.

Id. at 270. Two other courts of appeals are in accord with the principles applied in *White*.[4]

The Second Circuit's holding is also contrary to the settled professional understanding that waiver of the privilege occurs only if the defendant discloses a confidential communication or affirmatively places the advice of his counsel at issue. As the American Bar Association puts it, "the client has not implicitly relied on advice of counsel—leading to waiver of the privilege—merely by denying an allegation of bad faith."[5] Other commentators agree.[6]

---

[4] *See Ward v. Succession of Freeman*, 854 F.2d 780, 789 (5th Cir. 1988) (" '[t]o waive the attorney-client privilege . . . a defendant must do more than merely deny a plaintiff's allegations' ") (quoting *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987)), *cert. denied*, 490 U.S. 1065 (1989).

[5] American Bar Ass'n, *The Attorney-Client Privilege and the Work-Product Doctrine* 72 (2d ed. 1989).

[6] *See* ALI, *Restatement of the Law Governing Lawyers* § 130 comment C (Tent. Draft No. 2 1989) ("More must be shown [to constitute waiver] than that the client merely consulted a lawyer before pursuing the course of action in question. The client must affirmatively rely on specific advice or a specific act of the lawyer as substantial justification or mitigation"); *Developments in the*

The Second Circuit attempted to distinguish the present case from *White* on two factual grounds, both of which, we respectfully suggest, wholly fail to eliminate the conflict. First, the Second Circuit noted that White had merely denied that he acted with criminal intent, whereas petitioner's proffered testimony included the statement that he acted in "good faith." The Second Circuit asserted that petitioner remained "free to deny criminal intent . . . without asserting good faith." App. at 10a. But this option was illusory because the law recognizes no such distinction. Indeed, the jury instruction in this case, which was taken verbatim from Judge Sand's treatise, *Modern Federal Jury Instructions* Instr. 57-25, clearly indicates that there is no difference: "[S]ince an essential element of the crime charged is intent to defraud. . . . [t]he burden is on the government to prove fraudulent intent *and consequent lack of good faith* beyond a reasonable doubt." Tr. 3373 (emphasis added). A defendant who asserts that he did not act with criminal intent necessarily asserts that he acted in good faith.[7]

Law: Privileged Communications, 98 Harv. L. Rev. 1450, 1639-43 (1985) (waiver should only be found where the client seeks to introduce a privileged communication into evidence, whether affirmatively or defensively); C. Wolfram, *Modern Legal Ethics* § 6.4.7 (1986) ("A litigant does not put a lawyer's advice in issue simply by urging at trial a theory on which the lawyer might have given advice, if the advice is not itself put into evidence").

[7] In support of its argument that *White* is distinguishable, the Second Circuit also claimed that although petitioner would waive his privilege by testifying to his "good faith," he "was free . . . to argue his good faith defense by means of defense counsel's opening and closing statements." App. at 10a-11a. Not only is this assertion wrong as a matter of the Second Circuit's own precedent on trial practice, *see United States v. Smith*, 778 F.2d 925, 929 (2d Cir. 1985) (counsel may not argue defense on which he could not present evidence)—and as a matter of the Second Circuit's own precedent on waiver of the privilege, *see In re von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987) (defense counsel's statements can waive privilege to same extent as client's own statements)—it has nothing

The Second Circuit also sought to distinguish *White* on the ground that the privileged communications in *White* were ultimately admitted at trial, while in this case petitioner made an *in limine* motion and, after the motion was denied, altered his testimony to preserve his attorney-client privilege. But the Second Circuit did not cite, and we have not located, *any* case holding that a defendant cannot properly challenge on appeal a privilege ruling made in response to an *in limine* motion at trial.[8] This Court examined a claim of work-product protection in *United States v. Nobles*, 422 U.S. 225, 241 (1975), in exactly such a circumstance without requiring the defendant to have disclosed the arguably protected document at trial. Appellate courts have routinely reviewed *in limine* privilege rulings,[9] and commentators agree that such motions are the appropriate way to resolve privilege issues.[10]

---

to do with the basis on which the D.C. Circuit decided *White*. *See White*, 887 F.2d at 270 (district court erred because it wrongly equated denial of criminal intent with reliance on counsel defense).

[8] While the Second Circuit panel noted the factual difference that in *White* "the privileged communications were actually admitted at trial, allowing the appellate court an opportunity to examine whether defendant's case was or was not prejudiced," the panel did *not* conclude that petitioner's claim had not been properly preserved for appeal. App. at 11a-12a. Judge Lumbard, concurring, was alone in stating that the claim of error could not be brought at all. *See id.* at 31a ("Because Bilzerian decided not to testify on these matters, his claims are not properly preserved for appeal.").

[9] *E.g.*, *Parker v. Prudential Ins. Co.*, 900 F.2d 772, 775 (4th Cir. 1990); *Wylie v. Marley Co.*, 891 F.2d 1463, 1470-71 (10th Cir. 1989); *Allstate Ins. Co. v. James*, 845 F.2d 315, 320 (11th Cir. 1988).

[10] The principle that privilege issues should be considered *in limine* was reflected in Proposed Fed. R. Evid. 513(b), a rule promulgated by this Court and on which courts have relied as "reflective of reason and experience" in privilege matters. *United States v. Mackey*, 405 F. Supp. 854, 858, 865 (E.D.N.Y. 1975) (Weinstein, J.) (relying on Proposed Fed. R. Evid. 513(b)); *see also United*

The Second Circuit's reliance on this Court's decision in *Luce v. United States*, 469 U.S. 38 (1984), was misplaced. *Luce* held that admissibility of prior conviction evidence cannot be determined *in limine*, a holding premised on the need for the trial court to balance in the context of the trial the probative value of the prior conviction evidence against its likely prejudicial effect.[11] But the validity of a claim of attorney-client privilege does not depend on either the probative value of the evidence or its likely prejudicial effect;[12] there is no reason why a district court cannot evaluate *in limine* whether there is a privilege and whether proffered testimony would waive it.

There would be no sense to a rule that a defendant can preserve an attorney-client privilege claim only by disclosing the privileged communication in open court and thus destroying its confidentiality. Unlike prior conviction evidence, which is already known to both sides and is being shielded only from the jury, once a privileged communication is disclosed, its confidentiality is lost even if an appellate court later rejects the evidentiary ruling that caused the disclosure.[13] For this reason, there is no

---

States v. Gillock, 445 U.S. 360, 367 (1980) (relying on proposed privilege rules); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 103[05] (1990).

[11] *See* 469 U.S. at 41; *see also id.* at 44 (Brennan, J., concurring) ("I do not understand the Court to be deciding broader questions of appealability *vel non* of *in limine* rulings that do not involve Rule 609(a)").

[12] *See Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) (considerations of relevance or availability of proof "do not overcome the policies served by the attorney-client privilege"); *Restatement of the Law Governing Lawyers* § 118 comment D (privilege applies even if evidence excluded thereby is relevant; it will not be overborne even in cases where opposing party has demonstrated "extreme need").

[13] *See In re von Bulow*, 828 F.2d at 98 (order requiring disclosure of privileged communication is reviewable by appellate court on

case (other than the decision below) that has applied *Luce* or its reasoning to privilege issues.[14]

The Second Circuit held not only that petitioner's proffered testimony denying criminal intent would waive the privilege but also that petitioner's proffered fact testimony about the steps he took in structuring his acquisition attempts would waive the privilege. The court found waiver because, even if petitioner's testimony did not refer to his views about the legality of his conduct, "the topic [of how the acquisitions were structured] would necessarily involve Bilzerian's state of mind." App. at 12a. This ruling means that even a defendant's factual testimony about his own actions would often waive the privilege.

The Second Circuit's holdings ignore a fundamental principle: petitioner's state of mind and his actions were matters of fact, and his testimony about those facts, without reference to counsel, did not entitle the prosecution to examine his privileged communications. "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing." *Upjohn Co. v. United States*, 449 U.S. at 395-96 (emphasis in original). It is hornbook law that testimony about non-privileged facts does not constitute a waiver as to otherwise privileged communications. As Wigmore explains:

> The client's offer of his *own testimony* in the cause *at large* is not a waiver for the purpose either of cross-examining him [as] to the communications or of calling the attorney to prove them. Otherwise the

---

mandamus because "[c]ompliance with the order destroys the right sought to be protected").

[14] Indeed, the two circuits that have considered the issue have held that *Luce* is not applicable to the privilege against self-incrimination. *See Biller v. Lopes*, 834 F.2d 41, 43 (2d Cir. 1987); *United States ex rel. Adkins v. Greer*, 791 F.2d 590, 594 (7th Cir.), *cert. denied*, 479 U.S. 989 (1986).

> privilege of consultation would be exercised only at the penalty of closing the client's own mouth on the stand.

8 J. Wigmore, *Wigmore on Evidence* § 2327 (McNaughton rev. 1961) (emphasis in original).[15] The Second Circuit asserted that, despite its holding, petitioner remained "free to testify without getting into his state of mind." App. at 13a. But if, as the court held, testimony about the facts "necessarily" involves the defendant's state of mind (and thereby waives the privilege), there was nothing that the defendant remained "free" to say.

The issue on which the Second and D.C. Circuits are in conflict is of course a vital one. For more than a century, this Court has recognized the central importance of the attorney-client privilege to our system of justice.[16] Whether a defendant may testify as to his lack of criminal intent without waiving his attorney-client privilege will be an issue in a large number of cases.[17] And the

---

[15] *See also McCormick on Evidence* § 93 (E. Cleary 3d ed. 1984) ("[T]he mere voluntary taking the stand by the client as a witness in a suit to which he is party and testifying to facts which were the subject of consultation with his counsel is no waiver of the privilege for secrecy of the communications to his lawyer. It is the communication which is privileged, not the facts.").

[16] *See United States v. Zolin*, 109 S. Ct. 2619, 2625-26 (1989) (privilege " 'encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and the administration of justice' ") (quoting *Upjohn*, 449 U.S. at 389); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

[17] Intent is a critical issue in virtually all white collar criminal cases, securities actions, and commercial disputes involving allegations of fraud. Given the complexity of those matters, most defendants will have consulted counsel on some aspect of the transactions. As this Court has noted, "In light of the vast complicated array of

uncertainty that results from having different privilege rules apply in different circuits is particularly pernicious. As this Court has recognized, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

II. THE COURT SHOULD RESOLVE A CONFLICT BETWEEN THE SECOND CIRCUIT AND ALL OTHER CIRCUITS CONCERNING THE REQUIREMENT OF MATERIALITY UNDER 18 U.S.C. § 1001

Petitioner allegedly made misleading statements and omissions in certain reports required to be filed under Sections 13(d) and 14(d) of the Securities Exchange Act of 1934. The 1934 Act is itself a criminal statute, and false or misleading filings thereunder may be prosecuted, but the prosecution must prove that the misstatement or omission was *material* to investors.[18] Here, the prosecution avoided the 1934 Act materiality requirement by (i) bringing the case under 18 U.S.C. § 1001, the general false statements statute, and (ii) bringing it in the Second Circuit, which (in conflict with every other circuit) holds that a defendant may be convicted and sentenced to prison for a false statement under Section 1001 without proof that the statement was material in any respect.

Whether 18 U.S.C. § 1001 requires that a false statement be material is an important issue on which the Second Circuit and other circuits have been in conflict

---

[modern] regulatory legislation . . . [corporations and at least some individuals] constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter." *Upjohn*, 449 U.S. at 392 (citations and interior quotes omitted).

[18] *See* 15 U.S.C. § 78ff(a) (providing criminal penalties for "any person who willfully and knowingly makes . . . any statement in any . . . document required to be filed under this title . . . which statement was false or misleading with respect to any material fact").

for more than a decade. At trial, petitioner requested a standard instruction that the jurors could convict under Section 1001 only if they found beyond a reasonable doubt that any false statement was "material" to the government—that is, the statement had a natural tendency to influence or induce federal agency action.[19] Such an instruction is given routinely in the Ninth Circuit,[20] but it was denied to petitioner. Consistently with Second Circuit precedent, the district court ruled that petitioner could be convicted under the false statements branch of Section 1001 without any finding as to materiality and, in instructing the jury on the elements of that offense, the court did not include materiality.[21] The Second Circuit affirmed. App. at 24a.

---

[19] The requested instruction was taken from Sand, *et al.*, *Modern Federal Jury Instructions* Instr. 36-7; *compare* 2 Devitt, Blackmar & O'Malley, *Federal Jury Practice and Instructions* §§ 37.03, 37.07.

[20] *See, e.g., United States v. Clark*, 918 F.2d 843, 846 (9th Cir. 1990); *United States v. Larm*, 824 F.2d 780, 783 (9th Cir. 1987), *cert. denied*, 484 U.S. 1078 (1988); *United States v. Flake*, 746 F.2d 535, 537 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225 (1985); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979).

[21] Although the Second Circuit did not address it in this case, in addition to the "false statements" branch there is a distinct branch of Section 1001—the "falsify, conceal, or cover up" branch—as to which the Second Circuit's view is that materiality *is* an element but (in conflict with the Ninth Circuit) the Second Circuit believes materiality is a question for the court rather than the jury. *Compare United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984) *with United States v. Clark*, 918 F.2d at 846. In this case, the trial court instructed the jury on both branches of Section 1001, indicating that it had found materiality for purposes of the "falsify, conceal, or cover up" branch but that materiality was not necessary for the "false statements" branch. Because there was no special verdict in this case, it is impossible to know on which branch of Section 1001 the jury relied in reaching its verdict and no way to know whether the conviction was based on any determination of materiality. Should this Court hold that materiality is an essential element of a Section 1001 offense, it should resolve the conflict over whether the issue

This ruling was inconsistent with precedent in *every* other circuit. For more than a decade, the Ninth Circuit has held that materiality is an element of every Section 1001 prosecution and is a question for the jury. Every other circuit, except the Second, agrees that materiality is an element of the prosecution's case under Section 1001, but holds that the issue is one for the court.[22] Only the Second Circuit has concluded that there can be a conviction under Section 1001 without a finding of materiality.[23]

If petitioner had been prosecuted where he did business, in California, he would have been entitled to have a jury of his peers determine whether each alleged false statement was sufficiently material to constitute an of-

---

is one for the court or the jury by holding that, as an essential element of the crime, it is a jury issue. *See In re Winship*, 397 U.S. 358, 364 (1970) (jury must find proven beyond a reasonable doubt every element of an offense charged); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977) (judge may not direct a verdict against the defendant on any element of an offense, no matter how conclusive the evidence); *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 408 (1947) (same).

[22] *See, e.g., United States v. Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986); *United States v. Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985); *United States v. Norris*, 749 F.2d 1116, 1122 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); *United States v. Bryant*, 770 F.2d 1283, 1290 (5th Cir. 1985), *cert. denied*, 475 U.S. 1030 (1986); *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983); *United States v. Bullock*, 857 F.2d 367, 370-71 (7th Cir. 1988); *United States v. Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States v. Daily*, 921 F.2d 994, 1005 (10th Cir. 1990); *United States v. White*, 765 F.2d 1469, 1473 (11th Cir. 1985).

[23] *See, e.g., United States v. Elkin*, 731 F.2d at 1009; *United States v. Marchisio*, 344 F.2d 653, 665-66 (2d Cir. 1965); *United States v. Silver*, 235 F.2d 375, 377 (2d Cir.), *cert. denied*, 352 U.S. 880 (1956).

fense. If he had been prosecuted where he lived, in Florida, or where he submitted the allegedly false statements to the SEC, in Washington, D.C., he would have been entitled to have a federal judge determine whether those alleged misstatements were material.[24] But because he was prosecuted in New York, he received neither protection.[25] In enacting Section 1001, Congress could not have intended that the elements of the offense would vary based on the happenstance of where the defendant was prosecuted. This Court should resolve the longstanding circuit split concerning the materiality requirement under 18 U.S.C. § 1001.

III. THE COURT SHOULD DETERMINE WHETHER THE PROSECUTION MAY UTILIZE 18 U.S.C. § 1001 TO CIRCUMVENT THE SECURITIES EXCHANGE ACT REQUIREMENT OF MATERIALITY

The Second Circuit's erroneous ruling that materiality is not an element of the offense under Section 1001 is made more important and harmful by its ruling, on a question apparently of first impression, that misstatements and omissions in reports required under the 1934 Act may be prosecuted under Section 1001 instead of under the criminal provision of the 1934 Act. As Judge Winter concluded in dissent, that ruling was wrong: these two *particular* statutes should not be held to overlap in that way. Unless corrected by this Court, however, the ruling would permit federal prosecutors to circumvent a number of important limitations that Congress imposed on 1934 Act prosecutions.

---

[24] In *Kungys v. United States*, 485 U.S. 759, 772 (1988), this Court quoted with apparent approval a Sixth Circuit decision applying a materiality standard to a Section 1001 prosecution.

[25] Relying on the rationale of *Travis v. United States*, 364 U.S. 631 (1961), petitioner unsuccessfully argued below that venue for the Section 1001 charges was proper only in Washington, D.C. App. at 27a.

The 1934 Act was enacted by Congress on June 6, 1934 and regulates trading in the securities markets.[26] The Act requires most public companies, as well as many other market participants, to file periodic and special reports with the SEC. Such reports, including the ones at issue here, are designed to ensure that investors have access to adequate information on which to make investment decisions. *See Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975).

Section 32(a) of the 1934 Act, 15 U.S.C. § 78ff(a), makes it a crime to make a misstatement or omission in a report filed with the SEC. Section 32(a) provides, however, that such misstatements or omissions are criminal *only* if they are made with fraudulent intent and are misleading "with respect to any material fact." To satisfy this standard, the government must prove beyond a reasonable doubt that there is a substantial probability that the misstatement or omission would significantly alter the total mix of information available to a reasonable investor; this is a mixed question of law and fact for the jury to resolve.[27] Section 32(a) also provides a "no knowledge" defense to imprisonment for a 1934 Act rule violation.

By contrast, Section 1001, which was enacted by Congress on June 18, 1934—*twelve days* after the 1934 Act—is not primarily concerned with assuring the accuracy of information made available to members of the public.[28] Section 1001 was designed, rather, to protect the author-

---

[26] *See* Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (1934). The Act is presently codified at 15 U.S.C. § 78 *et seq.*

[27] *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976); *United States v. Carpenter*, 791 F.2d 1024, 1032 & n.9 (2d Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 19 (1987).

[28] The statute later codified with minor changes as Section 1001 was embodied in the Act of June 18, 1934, Pub. L. No. 73-394, ch. 57, 48 Stat. 996.

ized functions of federal government agencies from deceptive practices including monetary fraud. *See United States v. Rodgers*, 466 U.S. 475, 480 (1984). Section 1001 carried (at the time of its passage) substantially higher penalties than the 1934 Act but did not require the same stringent standards of proof. In particular, as construed by the Second Circuit, Section 1001 does not require that an alleged false statement be material in any respect,[29] and does not permit a "no knowledge" defense.

Judge Winter's dissenting opinion explains why the Second Circuit's ruling erroneously permits the prosecution to evade the requirements of Section 32(a):

> I, of course, do not disagree with the general canon . . . that criminal statutes may overlap and that, when they do, the government may choose to indict under one rather than another. I cannot agree, however, that because criminal statutes *may* overlap, Section 1001 *must* overlap with Section 32(a) of the 1934 Act. The bottom line is Congressional intent. . . . My colleagues' interpretation seems particularly

---

[29] *See United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984). As discussed above, other federal circuits do require a showing of "materiality" for a Section 1001 false statement prosecution, but it is a very different standard from that applicable under the 1934 Act. First, in most circuits, Section 1001 materiality is an issue for the court, not the jury. Second, it is a wholly different type of materiality: rather than focusing on the statement's importance to a reasonable shareholder, it focuses on its impact on governmental functions.

Petitioner's convictions on two counts under Section 10(b) and Rule 10b-5 did not require a materiality finding either. The jury was instructed (over defense objection) that it was required to find materiality *only* for purposes of the "untrue statement of fact" branch of Rule 10b-5, *not* for the "device, scheme or artifice to defraud" or "act, practice or course of conduct operating as a fraud" branches of the Rule. Tr. 3370-72. Because there was no special verdict, it is impossible to determine which branch of Rule 10b-5 the jury determined had been violated and, consequently, whether the jury found that any alleged misstatement or omission was material.

> questionable because the two provisions were the product of virtually simultaneous Congressional consideration and action and, at the time of passage, Section 1001 contained more stringent penalties. It certainly seems somewhat odd to me that Congress would pass Section 32(a), which specifically applies to filings required by the federal securities laws, and less than twelve days later render portions of it superfluous by passing a very general statute that required a lesser standard of proof and provided harsher penalties.

App. at 35a-36a (Winter, J., dissenting in part) (emphasis in original). The Court should resolve this important issue of federal criminal law.

IV. THE COURT SHOULD RESOLVE A CONFLICT BETWEEN THE SECOND CIRCUIT AND THE SIXTH CIRCUIT CONCERNING THE SCOPE OF THE CONSPIRACY TO "DEFRAUD" CLAUSE OF 18 U.S.C. § 371

The federal conspiracy statute, 18 U.S.C. § 371, prohibits two kinds of conspiracies: to commit an "offense" against the United States, and to "defraud" the United States or its agencies. In this case, the prosecution charged petitioner under both parts of the statute, alleging that the same conduct constituted a conspiracy to commit certain enumerated offenses and a conspiracy to defraud the government. Petitioner sought dismissal of the "defraud" charges, relying on *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), in which the Sixth Circuit held that Congress did not intend the "defraud" clause to reach conduct covered by the "offense" clause. The Second Circuit, however, declined to follow the Sixth Circuit's ruling. (The Seventh Circuit also recently declined to follow the Sixth Circuit's holding. *See United States v. Reynolds*, 919 F.2d 435 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1402 (1991).) The Court should grant certiorari to resolve this important conflict concerning the scope of the federal conspiracy statute.

Courts and commentators have recognized that Congress stated the offense and defraud clauses of Section 371 in the disjunctive and intended the two clauses to cover different conduct.[30] As one court explained, "[t]he second part of this disjunctive phrase [the defraud clause] is of broad import and contemplates wrongs *other than* conspiracies *to commit offenses* against the United States which are defined by statute." *United States v. Klein*, 124 F. Supp. 476, 480 (S.D.N.Y. 1954) (emphasis added), *aff'd on other grounds*, 247 F.2d 908 (2d Cir. 1957).

In *Minarik*, the Sixth Circuit held that an indictment alleging conspiracy to defraud based on conduct covered by the offense clause did not state an offense under Section 371.[31] The court reasoned that Congress intended the defraud clause to be an interim measure "reach[ing] conduct not covered elsewhere in the criminal code." 875 F.2d at 1194. Under this interpretation, "the scope of the 'defraud' clause may expand as new kinds of fraud and new governmental programs are invented, or it may contract when Congress deals specifically with a given problem, creating a specific offense out of conduct previously criminalized only where it took the shape of a conspiracy to defraud the United States." *Id.* at 1193. In reaching this result, the Sixth Circuit expressly relied on decisions of this Court holding that the rule of "lenity"

---

[30] *See, e.g., United States v. Vasquez*, 319 F.2d 381, 384 (3d Cir. 1963); Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 448-49 (1959) (fraudulent conduct that falls within offense clause should be treated exclusively under that branch of Section 371).

[31] In *Minarik*, the prosecution charged the defendants solely under the defraud clause, alleging a conspiracy to defraud the United States by impeding and obstructing the Treasury Department. The prosecution's evidence demonstrated that the defendants had removed or concealed goods from the IRS to avoid levy, conduct made unlawful by a specific federal statute. 875 F.2d at 1187-89, 1195.

applies to Section 371,[32] that efforts to broaden the scope of Section 371 are strongly disfavored,[33] and that Section 371 prosecutions are scrutinized with special care.[34] *Id.* at 1191-92.

Permitting the prosecution to bring conspiracy to defraud charges for conduct covered by a specific statute would not only undermine the purpose of Section 371 but also Congress' intent in enacting the specific prohibition. As the Sixth Circuit explained, when Congress creates a specific offense to prohibit specific conduct, it articulates the precise duties by which a citizen's conduct is to be judged and fixes penalties for violation of those duties. *See id.* at 1194. If the prosecution were permitted to charge a defendant under the defraud clause even though Congress had addressed the relevant conduct in a specific statute, the prosecution could render null Congress' determination of both the scope of the particular offense [35] and the assigned penalty.[36]

---

[32] *See Tanner v. United States*, 483 U.S. 107, 131 (1987) ("even if the Government's interpretation of § 371 could be pegged to some language in that section, the Government has presented us with nothing to overcome our rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity' ") (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

[33] *See Grunewald v. United States*, 353 U.S. 391, 404 (1957).

[34] *See Dennis v. United States*, 384 U.S. 855, 860 (1966).

[35] In *Minarik*, a specific tax statute defined precisely when a citizen's duty to disclose assets to the government arises: after a tax levy is authorized. The defraud clause, however, "does not spell out whether the duty to disclose assets to the government arises when the debtor first suspects that he may be indebted, or when the government begins an investigation or audit, or when it makes a formal assessment, or when the tax court . . . upholds its claim of indebtedness, or when the government levies on the property." 875 F.2d at 1194-95.

[36] If the two clauses are treated as overlapping, the prosecution could easily defeat the misdemeanor provision of Section 371. That provision states that when the "offense . . . which is the object

The Second Circuit offered no reason for disregarding *Minarik*, other than citation to its own prior cases in which the prosecution did proceed (apparently without challenge) under both clauses of Section 371. Similarly, the Seventh Circuit, which also has declined to follow *Minarik*, offered no basis for expanding the scope of the statute beyond that necessary for its purpose.[37] The Court should grant review and resolve this important issue.

---

of the conspiracy" is a misdemeanor, the penalty under Section 371 may not exceed the penalty imposed by Congress for the misdemeanor. If the prosecution could charge a defendant under the defraud clause even though Congress had considered that type of conduct and defined it as a misdemeanor, the prosecution could evade Congress' intent concerning the appropriate penalty. 875 F.2d at 1194.

[37] Indeed, in attempting to avoid *Minarik*, the Seventh Circuit read the *Minarik* holding in a manner inconsistent with the Sixth Circuit's view of its own holding. *Compare United States v. Reynolds*, 919 F.2d at 439 ("Although some language in *Minarik* suggests that the sixth circuit thought it better practice to charge a conspiracy to violate a particular statute, the holding of that case is only that the prosecution's theory changed so often that the defendant lacked notice of the charge against which he had to defend.") *with United States v. Gibson*, 881 F.2d 318, 320 n.1 (6th Cir. 1989) ("We recently held that 'conspiracies to commit specific offenses (which are also arguably general frauds)' must be prosecuted 'exclusively under the offense clause of § 371 . . . .' *United States v. Minarik*, 875 F.2d 1186, 1194 (6th Cir. 1989).").

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR F. MATHEWS *
STEPHEN H. SACHS
LOUIS R. COHEN
JOSEPH K. BRENNER
W. HARDY CALLCOTT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Petitioner

Dated: May 22, 1991

* Counsel of Record

APPENDIX

[Reported at 926 F.2d 1285]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 787—August Term, 1989

(Argued February 13, 1990 Decided January 3, 1991)

Docket No. 89-1502

UNITED STATES OF AMERICA,
Appellee,

v.

PAUL A. BILZERIAN,
Defendant-Appellant.

Before:
LUMBARD, CARDAMONE, and WINTER
Circuit Judges

Judge Lumbard concurs in a separate opinion; Judge Winter dissents in a separate opinion.

CHARLES FRIED, Cambridge, Massachusetts (Langdell Hall, Cambridge, Massachusetts, of counsel; Arthur F. Mathews, Stephen H. Sachs, Stephen F. Black, Joseph K. Brenner, Lee T. Lauridsen, W. Hardy Callcott, Mark

J. Leimkuhler, Wilmer, Cutler & Pickering, Washington, D.C., also of counsel), *for Appellant.*

DAVID E. BRODSKY, Assistant United States Attorney for the Southern District of New York (Roger S. Hayes, Acting United States Attorney, John W. Auchincloss II, Assistant United States Attorney for the Southern District of New York, New York, New York, of counsel), *for Appellee.*

Samuel J. Buffone, Washington, D.C. (Asbill, Junkin, Myers & Buffone, Chartered, Washington, D.C., of counsel) *filed a brief for amicus curiae National Association of Criminal Defense Lawyers.*

CARDAMONE, *Circuit Judge*:

One of the principal questions posed by this appeal is whether the availability of civil proceedings—often used to enforce the securities laws—forecloses the government from instituting criminal prosecution for the violation of these same laws. The complex contrivances revealed in the present record, such as "parking" stock at a brokerage firm in order to create the impression that the stock has been sold, or having a broker "accumulate" stock on an investor's behalf in order to delay disclosure of the purchase, carry home the meaning of Scott's "O, what a tangled web we weave, When first we practice to deceive!" 2 Sir Walter Scott, *Marmion*, Canto VI, XVII (Little Brown & Co. 1857). Although these schemes are not specifically dealt with in the securities laws, the Securities Exchange Act nonetheless contains a general antifraud provision and other federal laws prohibit conspiracy, fraud, and making false statements to United States agencies. This appeal addresses the propriety of enforcing the complained of trading methods through these general fraud and false statement provisions.

Appellant Paul A. Bilzerian (hereinafter referred to as Bilzerian or defendant) was convicted on nine counts of an indictment charging violations of securities fraud, making false statements to the Securities and Exchange Commission (SEC), and conspiracy to commit specific offenses, and to defraud the SEC and the Internal Revenue Service (IRS). The charges relate to transactions defendant made between May 1985 and October 1986 in the common stock of four companies: Cluett, Peabody and Company, Inc. (Cluett), Hammermill Paper Company (Hammermill), H.H. Robertson Company (Robertson) and Armco Steel (Armco). On September 29, 1989, the United States District Court for the Southern District of New York (Ward, J.), entered a judgment of conviction and sentenced Bilzerian to four years in prison and a $1.5 million fine.

FACTS

A. *The Underlying Transactions*

1. The Cluett Transactions

The indictment charged three fraudulent schemes relating to trades in Cluett. These involved misrepresenting the source of funds used to purchase stock, secretly accumulating stock through a nominee, and misrepresenting an "open market" purchase. By agreeing to share any profits and by guaranteeing against any loss, Bilzerian in April and May of 1985 raised $9 million to buy Cluett stock from various individual investors. The funds were transferred to him through a series of trusts set up for that purpose. Defendant was required to disclose purchase of this large block of stock on a form filed with the SEC known as a Schedule 13D. On the 13D, and its amendment, respecting the Cluett purchase, defendant stated that the stock was purchased with "personal funds," and did not disclose that they were raised from other investors with whom he had a profit-sharing and guarantee-against-loss agreement.

Bilzerian also engaged an employee of Jeffries & Company, Inc. (Jeffries), a registered broker-dealer, to accumulate stock on his behalf. Under stock accumulation, a broker-dealer purchases stock in its own account with the understanding that the customer will buy it at a later date at the broker's cost plus interest and commissions. In such a transaction the pre-arranged sale involves no risk of loss to the broker-dealer, who acts as a nominee for the true purchaser. On May 28, 1985 defendant purchased the accumulated stock without revealing the accumulation arrangement to the SEC. The indictment charged that the agreement was fraudulently designed to delay the reporting requirements of the securities laws.

Bilzerian also agreed to purchase 347,567 shares of Cluett common stock from a group of shareholders in contemplation of making a tender offer for that company, offering between $38 and $40 per share depending on the price of his tender offer. This proposed purchase was made with the understanding that the trade would not settle for 45 days and that defendant would cancel the purchase proposal if a third party offered more for the shares. Although he learned that 66,667 of the shares included in this block were already under his control, defedant advised the shareholder group to proceed with the sale. The offering statement claimed that 347,567 shares were purchased "in an open market transaction." The existence and terms of the privately-negotiated transaction were not disclosed.

The indictment alleged that the Cluett transactions violated §§ 10b and 32 of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. §§ 78j(b) and 78ff (Count one), and the federal false statements statute, 18 U.S.C. § 1001 (Counts Two, Three, and Four). Defendant was also charged with conspiring to defraud the SEC and to commit specific offenses in violation of 18 U.S.C. § 371 (Count Eight).

2. The Hammermill Transactions

In June 1986 defendant raised $8 million from an individual investor for the purpose of purchasing Hammermill stock. These funds were made available to him through a trust upon his agreeing to share any profits from the eventual sale of the stock. Bilzerian turned the funds over to a limited partnership—of which he was the general partner—and the partnership made the tender offer for Hammermill. The disclosure relating to the stock purchase and tender offer stated that defendant's contribution to the partnership was from "personal funds."

Once again, defendant arranged to have an employee of Jeffries accumulate Hammermill stock on his behalf. On July 21, 1986 he purchased 551,000 accumulated shares of Hammermill. Although he was required to disclose the acquisition as of July 7, he failed to file until July 25, and at that time did not disclose the accumulation agreement. The Hammermill transactions were alleged to violate 15 U.S.C. §§ 78j(b) and 78ff (Count Five), 18 U.S.C. § 1001 (Counts Six and Seven) and 18 U.S.C. § 371 (Count Eight).

2. The Robertson and Armco Transactions

Defendant also engaged in "stock parking" transactions in shares of Robertson and Armco. "Parking" refers to a transaction in which a broker-dealer buys stock from a customer with the understanding that the customer will buy the stock back at a later date for the purchase price plus interest and commissions. As with "accumulation" there is no market risk to the broker-dealer who is the owner of the shares in name only.

Bilzerian arranged to park 58,000 shares of Robertson with Jeffries for 30 days. Although he assured Jeffries he would repurchase the stock, the stock price fell substantially in the interim and he refused to honor his commitment. As a result, Jeffries incurred a $250,000

loss. Defendant compensated Jeffries in part for his loss by generating approximately $125,000 in commissions for the broker. He paid the remaining $125,000 with the understanding that it would be refunded when an additional $125,000 of commissions was generated. Jeffries sent Bilzerian a false invoice in the amount of $125,000 for "financial services" that were never performed, and the latter deducted the payment on a 1985 tax return. When additional commissions were generated in 1986 he sent Jeffries fictitious invoices for "consulting services" seeking a refund of the $125,000.

Defendant also arranged to park 306,000 shares of Armco with Jeffries for a 30-day period beginning September 2, 1986. In addition Jeffries agreed to accumulate Armco stock in its own account on defendant's behalf and then sell him the accumulated stock when he repurchased the 306,600 shares. On October 2, defendant purchased 818,900 shares of Armco from Jeffries at the prevailing market price of $8 per share. Although the broker realized a $575,000 gain on the sale, the profits belonged to defendant by virtue of the stock parking and accumulation agreements. Defendant sent his broker an invoice for fictitious "consulting services" in order to account for the profits he realized on the trade.

For his part in the Robertson and Armco trades, Bilzerian was charged with conspiring to defraud the SEC and the IRS and to commit specific offenses including violations of 15 U.S.C. §§ 78g, 78q, and 78ff (1988) and 18 U.S.C. § 1001, in violation of 18 U.S.C. § 371 (Count Nine).

B. *The Trial*

At trial defendant argued that he did not intend to violate the securities laws, but believed the financing structure of the transactions, utilizing trusts to borrow funds, would allow him legally to avoid disclosure regarding other investors, and that describing the source of his

funds as "personal" was lawful. A motion was made *in limine* seeking a ruling permitting him to testify regarding his belief in the lawfulness of describing the source of his funds as "personal" without being subjected to cross-examination on communications he had with his attorney on this subject, discussions ordinarily protected by the attorney-client privilege.

Declining to rule on the issue in the abstract, Judge Ward stated that if defendant testified regarding his good faith regarding the legality of the disclosure, it would open the door to cross-examination with respect to the basis for his belief, and that such cross-examination would allow inquiry into communications with his attorney. Thus, defendant did not testify regarding his good faith, and now claims the trial court's ruling prejudiced his defense and infringed his constitutional right to deny each element of the charge against him. Error is also claimed in several evidentiary rulings made at trial, including the district court's decision to admit expert testimony by a government witness on the legal requirements of the federal securities laws, while excluding similar expert testimony offered by the defense. Additionally, defendant challenges the admission into evidence of a $4 million tax return error on an unrelated personal tax return.

Beyond the challenge that his right to a fair trial was prejudiced, Bilzerian asserts fundamental errors in the prosecution of this case. Specifically, he contends that prosecution under the general false statements statute was improper in light of the existence of more specific securities laws covering the same conduct, that any misstatements or omissions made on securities filings were immaterial, and that he was improperly charged under the "defraud" clause of the federal conspiracy statute rather than the more specific "offense" clause.

DISCUSSION

I. CHALLENGES TO THE CONDUCT OF THE TRIAL

A. Attorney-Client Privilege

Defendant contends the testimony he sought to introduce regarding his good faith attempt to comply with the securities laws would not have disclosed the content or even the existence of any privileged communications or asserted a reliance on counsel defense. As such, he continues, the attorney-client privilege would not be waived by his testimony and, therefore, the trial court committed reversible error when it denied his motion *in limine* seeking to protect the privilege. He alleges that this ruling, together with similar rulings made during the course of the trial, prevented him from refuting the charge that he acted with criminal intent—a central element of the government's case—and that his constitutional right to "the fullest opportunity to meet the accusation against him . . . [and] to deny all the elements of the case against him," *Walder v. United States*, 347 U.S. 62, 65 (1954), was thereby encroached upon.

Professor Wigmore tells us that the attorney-client privilege, dating back to the 1600s, is the most ancient of the confidential communication privileges. Originally, it was the attorney's privilege; today, it is recognized as the client's. *See* 8 J. Wigmore, *Evidence* § 2290, at 542-44 (McNaughton rev. 1961). It may have arisen—with the advent of testimonial compulsion in Elizabethan England—as a judicial extension of the right of individuals to avoid self-incrimination. *Id.* at 543-44; Note, *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1502 (1985).

The purposes for the privilege are twofold: first, it assures that a person seeking legal advice may do so safely. Its existence therefore encourages the full and

truthful revelation by the client of all the facts in his possession. Second, no attorney can represent a client effectively unless the client discloses fully all the facts in his possession. Thus, the privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The fundamental purpose of the privilege is to " 'encourage full and frank communication between attorneys and their clients.' " *United States v. Zolin*, 109 S. Ct. 2619, 2626 (1989) (quoting *Upjohn*, 449 U.S. at 389).

Although the underlying rationale for the privilege has changed over time, it has retained its importance in the common law tradition. *Id.* at 2625-26; *see United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). The potential societal benefit may be great in cases like the one at bar, where defendant seeks legal advice in order to act within the confines of highly complex federal securities laws. Often the importance of the interests promoted by the privilege justify the exclusion of otherwise relevant evidence. *See McCormick on Evidence* § 72 at 152 (E. Cleary 2d ed. 1972).

However, the attorney-client privilege cannot at once be used as a shield and a sword. *See In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987); *see also Clark v. United States*, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused."). A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes. *See von Bulow*, 828 F.2d at 101-02. Thus, the privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications. *See United States v. Exxon Corp.*, 94 F.R.D. 246, 249 (D.D.C. 1981) (claim of good faith reliance on governmental representations waived attorney-client privilege); *Hearn v. Rhay*, 68 F.R.D. 574,

581 (E.D. Wash. 1975) (assertion of qualified immunity defense waived attorney-client privilege). This waiver principle is applicable here for Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.

In support of his argument that asserting a good faith defense does not waive the attorney-client privilege, Bilzerian points to *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989). In that case attorney-client communications were admitted at trial over defense counsel's objection, in part because defendant's assertion of lack of intent was deemed to have waived the privilege. In reversing White's conviction the court stated: "[a] rule thus forfeiting the privilege upon denial of *mens rea* would deter individuals from consulting with their lawyers to ascertain the legality of contemplated actions. . . ." 887 F.2d at 270. Because intent is an element of the case that the government must prove, the court continued, waiver of the attorney-client privilege based in denial of intent "would cut short both the privilege and the right." *Id.*

Denial of an essential element of the crime charged—here criminal intent—is a constitutional right to be carefully safeguarded. But *White* is distinguishable because the district court's ruling in the instant case did not prevent defendant from denying criminal intent; the district judge merely said that Bilzerian's own testimony as to his good faith would open the door to cross-examination, possibly including inquiry into otherwise privileged communications with his attorney. Defendant was free to deny criminal intent either without asserting good faith or to argue his good faith defense by means of defense coun-

sel's opening and closing statements and by his examination of witnesses.

Another important distinction between *White* and the case at bar is that in the former the privileged communications were actually admitted at trial, allowing the appellate court an opportunity to examine whether defendant's case was or was not prejudiced. *See White*, 887 F.2d at 272. Because defendant did not testify as to his good faith, the privileged communications were not introduced at trial. Hence, the trial court's ruling and our review of defendant's claims lack a specific factual context within which to determine if the defense was actually prejudiced. *See Luce v. United States*, 469 U.S. 38, 41 (1984) ("A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context."). The district court took great pains to point out that application of the privilege would hinge on the testimony elicited on direct examination. In response to defense counsel's statement that "[t]he government presumably then would be able to call the attorney because the privilege is gone," the court stated:

> I am not going to go to that point. It may be that the government would be bound by the answer of the witness but I am not going to get to that point because I don't think I have to at this juncture. I don't know how this is going to play out. Until I do, I think it is inappropriate for me to give any advisory opinion.

In effect, defendant was seeking an advisory ruling in advance, assuring that the attorney-client privilege would not be waived regardless of what developed in his direct testimony. In order for the privilege to operate effectively defendants must be able to rely on its protection, *see In re von Bulow*, 828 F.2d at 100 ("An uncertain privilege—or one which purports to be certain, but results in widely varying applications by the courts—is little better than no privilege."), but courts cannot sanc-

tion the use of the privilege to prevent effective cross-examination on matters reasonably related to those introduced in direct examination. *Cf. McGautha v. California*, 402 U.S. 183, 215-17 (1971) (defendant testifying on punishment issue in a bifurcated proceeding could not assert privilege against self-incrimination on issue of guilt); *Walder*, 347 U.S. at 63-65 (defendant who lied on witness stand not permitted to use exclusionary rule as shield against impeachment).

A district court's finding that a defendant has waived the attorney-client privilege is reviewed under the abuse of discretion standard. *See In re von Bulow*, 828 F.2d at 101. Here the district court's ruling did not prevent the defense from urging lack of intent. Accordingly, the refusal to grant Bilzerian blanket protection from an implied waiver of the attorney-client privilege was not an abuse of discretion.

Bilzerian asserts the court ruled that even his own testimony regarding the steps he took to change the structure of his financing arrangements would waive the privilege. He argues that testimony about underlying facts cannot waive the privilege, because the attorney-client privilege does not extend to underlying facts. *See Upjohn*, 449 U.S. at 395-96. To the contrary, the trial court held only that Bilzerian's testimony about the changes would open the door on cross-examination to inquiry into Bilzerian's reasons for making the changes, because the topic would necessarily involve Bilzerian's state of mind. Even defendant's trial counsel knew the testimony about the changes would be inextricably intertwined with Bilzerian's assertion of good faith. Counsel said: "Mr. Bilzerian's response would be in substance that he directed these changes to be made so that—in order to enable himself to be able to report as personal funds on the 13D the funds that he received from the trust that he would not have to disclose any of the investors' names and that he thought that doing that, that he believed that was

appropriate and proper". The trial court's ruling left defendant free to testify without getting into his state of mind, but correctly held that if he asserted his good faith, the jury would be entitled to know the basis of his understanding that his actions were legal.

B. Expert Testimony

Defendant next contends that his ability to defend himself was unfairly prejudiced by the trial court's rulings on the admissibility of expert testimony. The court erred, he says in allowing Professor John C. Coffee, a government expert witness, to testify regarding the requirements of Schedule 13D concerning disclosure of the source of funds and arrangements and understandings with others.

Particularly in complex cases involving the securities industry, expert testimony may help a jury understand unfamiliar terms and concepts. Its use must be carefully circumscribed to assure that the expert does not usurp either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it. *See United States v. Scop*, 846 F.2d 135, 139-40, *modified*, 856 F.2d 5 (2d Cir. 1988); *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 510-11 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977).

As a general rule an expert's testimony on issues of law is inadmissible. *See generally*, Note, *Expert Legal Testimony*, 97 Harv. L. Rev. 797 (1984). The *Marx* and *Scop* cases distinguish between factual conclusions that may be included in an expert's testimony—though they embrace an ultimate issue to be decided by the jury—and opinions embodying legal conclusions that encroach upon the court's duty to instruct on the law. *See Scop*, 846 F.2d at 142; *Marx*, 550 F.2d at 512. In *Marx*, it was held that an expert's legal opinion on the meaning of certain contract terms was outside the witness' area of

expertise and was also an invasion of the court's authority to instruct the jury on the applicable law. 550 F.2d at 509-510. In *Scop*, an expert's repeated statements that defendants' conduct established a manipulative and fraudunet scheme within the meaning of the securities laws exceeded the permissible scope of opinion testimony. 846 F.2d at 139. These cases establish that although an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts.

Unlike *Scop* and *Marx*, the government's expert in the present case did not give his opinion as to whether Bilzerian's actions violated the securities laws. As the government's first witness, much of Professor Coffee's testimony was general background on federal securities regulation and the filing requirements of Schedule 13D, which he presented by referring to a blank form. Although Professor Coffee did answer a few questions based on hypothetical facts, the use of hypotheticals was first introduced by the defense on cross examination. The mere use of hypotheticals does not usurp the jury's function of applying the law to the facts of the case. *See Scop*, 846 F.2d at 143. Further, since the expert's general testimony was not objected to at trial, the issue was waived. *See United States v. Heinemann*, 801 F.2d 86, 96 (2d Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

Following a specific objection that Professor Coffee's testimony constituted an impermissible legal instruction, Judge Ward limited his testimony regarding 13D's requirements by asking the jury to read specified instructions on the blank Schedule 13D and to ask Professor Coffee to clarify any ambiguity in the instructions. In addition, the trial judge gave a limiting instruction indicating that the expert's testimony was simply background information:

> Professor Coffee is here to furnish you with background concerning the meaning of terms, the pro-

> cedures which are followed and his opinion as to the reason for these procedures. He is not here to give his opinion as to what the law requires. That is a matter which must be presented to you by the court.

With respect to the admission or exclusion of expert evidence, we defer to the trial judge's broad discretion unless his decision is clearly wrong. *See Salem v. United States Lines*, 370 U.S. 31, 35 (1962); *United States v. Daly*, 842 F.2d 1380, 1387 (2d Cir.), *cert. denied*, 488 U.S. 821 (1988). In view of the general background nature of the unobjected to testimony and the court's limiting instruction to defense counsel, we see no abuse of discretion in admitting the expert testimony.

Bilzerian argues further that the trial court erred in limiting the testimony of his expert witness, Lee B. Spencer, Jr., former director of the SEC's Division of Corporate Finance. The defense sought to elicit that the phrase "personal funds," as generally understood in the securities industry, includes funds derived from loans of the type received by defendant. It hoped to demonstrate with this evidence defendant's good faith in completing the disclosure form. Judge Ward excluded this proof because it related directly to the issue of whether Bilzerian's actual 13D disclosures complied with the legal requirements. Thus, the expert testimony would have constituted an impermissible instruction on governing law. Defense counsel was informed that it would have an opportunity to submit proposed jury instructions regarding the scope of "personal funds."

Although testimony concerning the ordinary practices in the securities industry may be received to enable the jury to evaluate a defendant's conduct against the standards of accepted practice, *Marx*, 550 F.2d at 509, testimony encompassing an ultimate legal conclusion based upon the facts of the case is not admissible, and may not be made so simply because it is presented in terms

of industry practice. Several hypothetical questions posed to Mr. Spencer included the particular facts alleged in the indictment, blurring the line between testimony regarding industry practice and an opinion on the legality of defendant's conduct. It does not appear that the trial court's ruling was clearly wrong or that the limits placed on Spencer's earlier testimony prejudiced the defense.

C. Admission of Evidence Regarding Bilzerian's 1986 Personal Tax Return

Defendant next alleges that the district court abused its discretion in admitting evidence of a $4 million error made on his 1986 personal income tax return. The evidence was part of the testimony given by Brian Murphy, a former senior tax manager with the accounting firm of Peat Marwick Main & Co. who had done accounting work for some partnerships in which defendant participated. On direct examination the government elicited testimony that during Murphy's preparation of tax returns for Bilzerian's Hammermill-related partnerships, Bilzerian stated that the source of his contribution to the partnership was personal funds. The trial evidence indicated to the contrary that the money was borrowed.

On cross-examination, the defense sought to establish that the source of funds was irrelevant for tax purposes and that the tax returns filed on behalf of the partnerships, including the Bilzerian contribution, were correct. On redirect the government elicited the fact that defendant had underreported income from the Hammermill transaction on his personal tax return for 1986 by approximately $4 million.

The trial court stated since a partnership pays no income taxes, the testimony given on cross-examination regarding the accuracy of partnership returns created the impression that defendant had accurately reported his income from the Hammermill transaction. As such, the

door had been opened to correct the false impression, including inquiry into defendant's personal tax returns.

Bilzerian asserts the evidence was inadmissible pursuant to Rules 403 and 404(b) of the Federal Rules of Evidence. Rule 404(b) prohibits the introduction of "other crimes, wrongs, or acts" for the purpose of demonstrating defendant's propensity to commit the charged crime. Fed. R. Evid. 404(b). The district court noted the evidence was not admitted for that improper purpose, but in order to rebut a false impression that had been created. Redirect may of course be used to rebut false impressions arising from cross-examination, and the scope of such redirect is within the trial court's broad discretion. *United States v. Mang Sun Wong*, 884 F.2d 1537, 1544 (2d Cir. 1989), *cert. denied*, 100 S. Ct. 1140 (1990).

Rule 403 permits the court to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The weighing of relevance under Rule 403 may be altered when a false impression is created by earlier testimony. That is, evidence whose probative value might not ordinarily outweigh its prejudicial effect if offered on direct examination is admissible to rebut testimony elicited on cross examination that created a false impression. *United States v. Martinez*, 775 F.2d 31, 37 (2d Cir. 1985). Balancing relevance against prejudice under Rule 403 is in the hands of the trial court and will not be overturned unless its ruling is arbitrary or irrational. *See United States v. Esdaille*, 769 F.2d 104, 108 (2d Cir.), *cert. denied*, 474 U.S. 923 (1985).

The deficiency in Bilzerian's personal tax return was not relevant to the charge of conspiracy to defraud the IRS or to any other charge in the indictment. In addition, the testimony on cross examination related only to defendant's partnership tax return. His personal re-

turn at most had a tenuous connection to the issues at trial. Yet, the fact of his tax error was introduced without objection when he was cross-examined. In such context the evidence was admissible under Fed. R. Evid. 611(b) as probative of his veracity. The trial court was in the best position to judge whether a false impression was created by Murphy's cross-examination, and the decision to admit this evidence was within the trial court's discretion. Here, in addition, Judge Ward gave a limiting instruction stating that the contested evidence was to be considered only in evaluating Murphy's testimony regarding his preparation of the partnership returns. Thus, the rulings on the admissibility of the tax error were proper.

II. ALLEGED PROSECUTORIAL FAILURES

A. Liability Under § 10(b) and Rule 10b-5

Again, Bilzerian contends the securities fraud convictions cannot be sustained because any misstatements or omissions made, including the delays in disclosing his stockholdings, were not material. The securities fraud counts charged that in connection with the Cluett and Hammermill transactions defendant violated § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1988),[1] and Rule

---

[1] Section 10 of the Exchange Act, 15 U.S.C. 78j (1988), provides in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

10b-5 of the regulations promulgated thereunder, 17 C.F.R. § 240.10b-5 (1990)[2]. Section 10(b) and Rule 10b-5 prohibit fraudulent practices in connection with the purchase or sale of a security, including the knowing misrepresentation or omission of material facts.

Section 10(b) was designed to protect investors engaged in the purchase and sale of securities by implementing a policy of full disclosure. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-78 (1977). The § 10(b) convictions were largely based on misrepresentations made on Schedules 13D and 14D-1 concerning the source of the funds used for the transactions and on the untimely filing of the forms. Some background on the filing requirements relating to Schedule 13D and Schedule 14D-1 is helpful to understanding this portion of the case. Both forms are reports filed with the SEC and made available to the public. They disclose the acquisition of a significant amount of stock in a publicly traded company. Schedule 14D-1, 17 C.F.R. 240.14d-100 (1990), discloses the commencement of a tender offer for the stock of a public company. *See Finnegan v. Campeau Corp.*, No. 89-9183, slip op. (2d Cir. Oct. 4, 1990). Schedule 13D, 17 C.F.R. § 240.13d-101 (1990), the focus of this prosecution, discloses that an investor has acquired bene-

---

[2] Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1990).

ficial ownership of five percent or more of the stock of a public company.

Pursuant to § 13(d) of the Exchange Act, 15 U.S.C. § 78m(d)(1) (1988),[3] defendant was required to file a Schedule 13D within ten days after he became the beneficial owner of five percent of the stock of Cluett and Hammermill. Section 13(d)'s purpose is to "alert investors to potential changes in corporate control so that they [can] properly evaluate the company in which they had invested or were investing." *GAF Corp. v. Milstein*, 453 F.2d 709, 720 (2d Cir. 7971), *cert. denied*, 406 U.S. 910 (1972); *see also Mayer v. Chesapeake Ins. Co.*, 877 F.2d 1154, 1162 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 722 (1990) (purpose of § 13(d) is to alert marketplace and permit investors to assess potential for change in corporate control). In addition to background information about the persons purchasing the stock, § 13(d) specifically requires disclosure of:

> (B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such se-

---

[3] Section 13d(1) of the Exchange Act, 15 U.S.C. § 78m(d)(1) (1988), provides in pertinent part:

> Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 781 of this title . . . is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors— . . . .

> curity, a description of the transaction and the names of the parties thereto . . .
>
> . . .
>
> (E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranteies of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

15 U.S.C. § 78m(d)(1).

A duty to file under § 13(d) creates the duty to file truthfully and completely. *SEC v. Savoy Industries*, 587 F.2d 1149, 1165 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979); *GAF*, 453 F.2d at 720. Although § 13(d) is a reporting requirement rather than an antifraud provision, criminal penalties are available against one who knowingly makes a false and misleading statement of material fact on a document required to be filed by the securities laws. 15 U.S.C. § 78ff. In addition, a false or misleading statement made on a Schedule 13D may be actionable under the antifraud provision of § 10(b). *GAF*, 453 F.2d at 720; *see also Kamerman v. Steinberg*, 891 F.2d 424, 431 (2d Cir. 1989). In either case, materiality of the misstatement or omission is a prerequisite to liability.

Contending there were no material misstatements or omissions to support his § 10(b) convictions, defendant argues first that the absence of any market fluctuation in Cluett stock immediately after his 13D was filed demonstrates that the information was not important to investors. Second, he asserts, the source of the funds he used was not material because he could have lawfully

avoided disclosing his investors' identities by channeling the money through limited partnerships rather than trusts. From this premise he reasons that because the investors' identities could have been concealed, the fact that an unnamed other person was investing with him was not a material fact.

The standard of materiality under the securities laws was set forth by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976). An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in making an investment decision. *Id.* at 449; *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Determination of materiality is a mixed question of law and fact that the Supreme Court has stated is especially well suited for jury determination. *TSC*, 426 U.S. at 450 ("The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts . . . and these assessments are peculiarly ones for the trier of fact.")

Turning to defendant's first point, whether a public company's stock price moves up or down or stays the same after the filing of a Schedule 13D does not establish the materiality of the statements made, though stock movement is a factor the jury may consider relevant. *See Akerman v. Oryx Communications, Inc.*, 609 F. Supp. 363, 368 (S.D.N.Y. 1984), *aff'd*, 810 F.2d 336 (2d Cir. 1987); *SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8, 15-16 (2d Cir. 1977). With respect to the second point, we decline to hold that the information required to be disclosed in 13D is material *per se* for purposes of § 10(b) simply because such disclosure is required under the securities laws. But the fact that the information is required to be reevaled under § 13(d) is evidence of its materiality. *SEC v. Levy*, 706 F. Supp. 61, 72 (D.D.C. 1989).

After hearing the evidence in this case the jury concluded that the misstatements and omissions were ma-

terial. Defendant faces a heavy burden when challenging the sufficiency of the evidence leading to his conviction. *See United States v. Zabare*, 871 F.2d 282, 286 (2d Cir.), *cert. denied*, 110 S. Ct. 161 (1989). If any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the conviction must be affirmed. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

It was not unreasonable for the jury to conclude that erroneously describing the source of funds as "personal" was material, for it indicated the honesty and feasibility of Bilzerian's plans for the investment. *See Savoy*, 587 F.2d at 1166-67 (failure to disclose participation of a certain investor violated § 13(d) and was material under § 10(b)); *Levy*, 706 F. Supp. at 73 (failure to reveal on 13D that stock purchase was funded with borrowed money was material under § 10(b)). It was also reasonable for the jury to find that defendant engaged in a fraudulent scheme to avoid the disclosure requirements of § 13(d). *See SEC v. First City Financial Corp., Ltd.*, 688 F. Supp. 705, 724 (D.D.C. 1988), *aff'd*, 890 F.2d 1215, 1228 (D.C. Cir. 1989) (stock parking arrangement used to delay filing Schedule 13D violated § 13(d)). Since the question of materiality is especially well suited for jury determination, and defendant has not demonstrated a lack of sufficient evidence to support that body's conclusion, there is no basis to set aside the securities fraud convictions.

B. Liability Under 18 U.S.C. § 1001

For making false statements on the Forms 13D and 14D-1 filed with the SEC, Bilzerian was charged with violating the general false statements statute, 18 U.S.C. § 1001, rather than the more specific securities law provisions. He contends that the government's prosecution under § 1001 was an unprecedented attempt to impose criminal penalties without complying with the specific requirements for criminal prosecution under the 1934 Act.

Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1988). The statute was designed "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States v. Gilliland*, 312 U.S. 86, 93 (1941); *see also United States v. Fitzgibbon*, 619 F.2d 874, 877-78 (10th Cir. 1980) (describing legislative history). To support a conviction under § 1001, the government must establish that the defendant (1) knowingly and willfully (2) made a statement (3) in relation to a matter within the jurisdiction of a department or agency of the United States, (4) with knowledge that it was false or fictitious and fraudulent. *See United States v. Silva*, 715 F.2d 43, 49 (2d Cir. 1983). Under our decisions, materiality of the statement is not an element of the offense. *See United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir.), *cert. denied*, 469 U.S. 822 (1984); *United States v. Silver*, 235 F.2d 375, 377 (2d Cir.), *cert. denied*, 352 U.S. 880 (1956).

Defendant asserts that it was Congress' purpose to have criminal prosecutions, for misstatements in informational reports filed within the SEC, brought under § 32(a) of the Exchange Act, 15 U.S.C. § 78ff, a specific enforcement provision setting forth criminal penalties for willful violations of the securities laws and the applicable rules and regulations. Unlike the false statements statute, § 32(a) requires proof of materiality and contains

a provision that imprisonment will not be imposed on a defendant who was ignorant of the substance of the rule. In pertinent part it provides:

> Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required . . . or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $1,000,000, or imprisoned not more than 10 years, or both . . .; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

15 U.S.C. § 78ff (1988).

It is settled law that "when an action violates more than one criminal statute, the Government may prosecute either so long as it does not discriminate against any class of defendants." *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979). Prosecution has additionally been permitted under § 1001 despite the existence of other overlapping and more specific false statement statutes. *United States v. Gordon*, 548 F.2d 743, 744 (8th Cir. 1977); *see also, e.g., United States v. Grotke*, 702 F.2d 49, 54 (2d Cir. 1983) (§ 1001 applicable despite more specific currency reporting statute.).

Defendant argues that in the case of alleged misstatements or omissions in informational reports filed under the Exchange Act, Congress planned that § 32(a) and not § 1001 control. At the time § 1001 was enacted—only 12 days after the Exchange Act was passed—it provided harsher penalties than § 32(a), though the requirements for conviction under § 1001 were less stringent. Nonetheless, proximity of the enactments without more does

not suggest that the application of the false statements statute was to be limited by the just-enacted securities laws. Absent more explicit indicia of Congressional purpose to foreclose the use of § 1001, the general rule that criminal statutes may overlap controls. The fact that less proof is required for conviction under § 1001 does not amount—as defendant alleges—to overriding the requirements of § 32(a).

Defendant also asserts that statements made on Schedules 13D and 14D-1 are not matters "within the jurisdiction of" the SEC because with respect to these statements the SEC is merely a repository of information and does not act upon the statements. It is his view that § 1001 is appropriate only for misstatements or omissions (1) made during an active governmental inquiry or (2) that formed the basis for some sort of governmental action.

The Supreme Court has stressed that the term "jurisdiction" in § 1001 should be broadly construed. An agency has jurisdiction within the meaning of the statute when it has authority to act upon the information. *See United States v. Rodgers*, 466 U.S. 475, 479-80 (1984); *United States v. Adler*, 380 F.2d 917, 922 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967). "A statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001." *Bryson v. United States*, 396 U.S. 64, 71 (1969).

A statutory basis for the SEC's request for information exists because the Exchange Act requires the documents at issue to be filed with it. 15 U.S.C. §§ 78m(d), 78n(d) (1988). This executive agency is authorized to regulate the content of the documents and to investigate and prosecute violations of law based on the filings. 15 U.S.C. §§ 78m(d), 78u (1988); *see United States v. Fields*, 592 F.2d 638, 649 (2d Cir. 1978) (filing prospectus which concealed material facts with SEC stated a claim under § 1001), *cert. denied*, 442 U.S. 917 (1979); *United States v. Kuna*, 760 F.2d 813, 820 (7th Cir. 1985)

(sustaining conviction under § 1001 for false statement on broker-dealer registration); *United States v. Di Fonzo*, 603 F.2d 1260, 1263-64 (7th Cir. 1979) (documents submitted to SEC in course of investigation within its jurisdiction), *cert. denied*, 444 U.S. 1018 (1980); *see also United States v. Hansen*, 772 F.2d 940, 943-44 (D.C. Cir. 1985) (the term "jurisdiction" in § 1001 embraces the authority to conduct an official inquiry), *cert. denied*, 475 U.S. 1045 (1986); *United States v. Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982) (grant of authority rather than its exercise determines jurisdiction).

Although the SEC may not act on every Schedule 13D, the filing of a false statement may interfere with its investigatory and enforcement function, including its determination whether or not to investigate a transaction. The securities laws are designed to make accurate information available to the investing public; the SEC's authority to regulate disclosure required under those laws brings the securities filings at issue within its jurisdiction for purposes of § 1001.

Further, defendant makes a venue objection, stating the alleged violation occurred in Washington D.C., where the document was filed, and that the drafting of the document was mere preparation for the offense, not part of it. *See United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1190 (2d Cir.), *cert. denied*, 110 S. Ct. 324 (1989). We disagree. The documents were prepared and signed—i.e. "made"—within the Southern District of New York, and thus venue was properly laid there. *See United States v. Mendel*, 746 F.2d 155, 165 (2d Cir. 1984) (venue under § 1001 lies either where documents were prepared or filed), *cert. denied*, 469 U.S. 1213 (1985).

C. Conspiracy

Bilzerian was convicted on two conspiracy counts alleging that he participated in two multi-object conspiracies intended to defraud the United States and to commit

specific offenses. The first conspiracy involved an agreement to park Robertson & Armco stock to generate tax losses without complying with disclosure required by § 13(d); the second was a scheme to accumulate Cluett and Hammermill shares, also without providing disclosure under § 13(d). These agreements were found to violate the federal conspiracy statute, 18 U.S.C. § 371 (1988), which provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 371 prohibits two distinct types of conspiracies; conspiracies to defraud the United States and conspiracies to commit an offense against the United States. While the offense clause governs a conspiracy to commit a specific offense, defined elsewhere in the federal criminal code, the defraud clause is broader and covers agreements to interfere with or to obstruct government's lawful functions. *See United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987).

Bilzerian would have us rule that when conduct is chargeable under the specific offense clause, the government is precluded from prosecuting under the defraud clause. *See United States v. Minarik*, 875 F.2d 1186, 1193-94 (6th Cir. 1989). Thus, he posits that the charges of conspiracy to defraud failed to state an offense because the conduct complained of is covered by specific statutes, that is, 15 U.S.C. §§ 78m(d), 78ff. This proposition is not persuasive. In *Minarik*, prosecution solely under the defraud clause—despite the existence of a specific statutory offense governing the conduct—led to substantial confusion and prejudiced the defendant's ability

to prepare for trial. *Id.* at 1189-90. In any case, defendant's reading of *Minarik* is contrary to established law.

Although it is recognized that the government may not obtain two convictions or punish the defendant twice for the same conduct by alleging violations of both the defraud and offense clauses of the conspiracy statute, *see, e.g., May v. United States*, 175 F.2d 994, 1002 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949), it may simultaneously prosecute the same conduct under both clauses. *See Nersesian*, 824 F.2d at 1313; *United States v. Williams*, 705 F.2d 603, 623-24 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983).

The schemes alleged in the instant case involved violations of numerous statutes, including § 13(d) and § 1001, and the requirements that broker-dealers make and keep accurate records, 17 C.F.R. §§ 240.17a-3, 240.17a-4. Additionally, the indictment charged broader conspiracies involving stock accumulation and stock parking, which are activities not specifically prohibited by statute. Consequently, there is no prosecutorial impropriety in charging defendant under both prongs of § 371.

Defendant further argues that the conspiracy to defraud charges fail to state an offense because the mere failure to comply with a regulatory requirement to provide information did not amount to active interference with a governmental function. *See Tanner v. United States*, 483 U.S. 107, 130 (1987) (United States or an agency thereof must be the target of the conspiracy). As noted, the SEC is charged with administering and enforcing securities laws, and in order to perform its function must receive accurate and truthful disclosure. The function of the IRS in determining the legitimacy of a return similarly may be impaired by schemes generating tax losses and by false claims for deductions. Hence, the defraud conspiracy charges state an offense.

Finally, Bilzerian urges that was insufficient proof of an agreement to commit specific offenses. A conspiracy conviction based on a multi-object conspiracy may be upheld so long as evidence is sufficient with respect to at least one of the criminal objectives. *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Viewing the evidence in the light most favorable to the government, *see Glasser v. United States*, 315 U.S. 60, 80 (1942), we believe a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319.

The evidence at trial suggested that defendant planned to acquire large blocks of stock while delaying the reporting requirements in contravention of the securities laws, and that numerous records were generated to make it appear that Jeffries and Company had acquired stock at its own risk. False records also were generated to substantiate tax deductions that Bilzerian claimed on his 1985 tax return. As to each of the conspiracies charged there is adequate evidence from which a rational juror could have concluded that a conspiracy existed to achieve at least one criminal objective, that is to say, either to violate § 13(d) or to defraud the SEC and the IRS.

CONCLUSION

Accordingly, the judgment of conviction is affirmed in all respects.

LUMBARD, *Circuit Judge*, concurring:

I concur in the affirmance of the judgment of conviction, substantially for the reasons set forth in Judge Cardamone's opinion.

Bilzerian was not denied a fair trial because the district court precluded him from denying criminal intent without waiving the attorney-client privilege. The court had ruled preliminarily that if Bilzerian testified regarding his good faith belief in the legality of certain conduct [1] he would subject himself to cross-examination as to the basis of that claim, including questions regarding communications that otherwise would be protected by the attorney-client privilege. As a result, Bilzerian took the stand but chose not to assert his good faith belief.

Because Bilzerian decided not to testify on these matters, his claims are not properly preserved for appeal. *See United States v. Ortiz*, 857 F.2d 900, 906 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1352 (1989). Nevertheless, there was no error in Judge Ward's rulings. If Bilzerian had asserted good faith on direct examination, he could not use the attorney-client privilege to avoid cross-examination regarding the basis of that claim. *See United States v. Miller*, 600 F.2d 498, 501 (5th Cir.), *cert. denied*, 444 U.S. 955 (1979).

Bilzerian's contention that the district court erroneously admitted testimony by the government's expert while it excluded similar expert testimony by the defense has no merit. At trial, Judge Ward allowed the government witness, Professor John C. Coffee, to provide background information regarding the securities laws and the

---

[1] Bilzerian sought to testify that he acted in good faith in making certain statements in documents filed with the SEC, and in changing the structure of certain financing arrangements. In cross-examination regarding alleged prior inconsistent testimony before the SEC, Bilzerian similarly sought to assert that he believed his conduct was legal.

filing requirements of Schedule 13D. The district court permitted Bilzerian's expert, Lee B. Spencer, Jr., to do the same, but prohibited him from opining on the propriety of describing unsecured loans as "personal funds," in a Schedule 13D.

Much of Professor Coffee's testimony, which Bilzerian now contends was improperly admitted, was not objected to at trial. As a consequence, it cannot now be assigned as error. *See* Fed. R. Evid. 103(a)(1); *United States v. Heinemann*, 801 F.2d 86, 96 (2d Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987). In any event, Coffee's testimony was proper factual background information, rather than legal conclusions. *See United States v. Scop*, 846 F.2d 135 (2d Cir.), *modified on rehearing*, 856 F.2d 5 (1988); *Marx & Co. v. Diner's Club, Inc.*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977). Moreover, Judge Ward subsequently instructed the jury as to the limited purpose of the testimony.

There was no error in excluding Spencer's testimony regarding the meaning of the phrase "personal funds" in a Schedule 13D, as it was an impermissible instruction on governing law.

Third, Bilzerian's contention that the district court erred in admitting evidence of an error in Bilzerian's 1986 personal tax return is not persuasive. Brian Murphy, an accountant who prepared tax returns for a partnership in which Bilzerian participated, testified that Bilzerian told him that part of Bilzerian's capital contribution was personal funds. On cross-examination, Bilzerian sought to establish that the source of the funds had no effect on the partnership tax return. Bilzerian also elicited testimony regarding the accuracy of the partnership tax return. On redirect, over defense objection, the government inquired into the accuracy of Bilzerian's personal tax return, and elicited testimony that Bilzerian had understated his income by $4 million. Judge Ward denied Bilzerian's motion for a mistrial. He

found that Bilzerian's cross-examination had created the impression that Bilzerian accurately reported the income on all tax returns, and this had opened the door to the government's redirect. Judge Ward acted within his discretion in admitting this evidence on redirect, to rebut the possible misimpression, arising from cross-examination, that Bilzerian accurately reported on all of his 1986 tax returns. *See United States v. Mang Sun Wong*, 884 F.2d 1537, 1544 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1140 (1990).

Bilzerian next argues that it was improper for the government to prosecute him under the federal false statements statute, 18 U.S.C. § 1001 (1988) ("Section 1001"), for alleged mistatements and omissions in informational reports required by the Securities Exchange Act of 1934 because the government could prosecute him under Section 32(a) of the Exchange Act, 15 U.S.C. § 78ff (1988) ("Section 32(a)").

It is well-settled that when two statutory provisions overlap, the government may decide under which section to proceed, unless it is clear that Congress intended one section to preempt the other. Congress has not expressed any such intent regarding these provisions.

Fifth, Bilzerian asserts that even if his conduct constituted offenses under Section 1001, constitutional venue was proper only in Washington, D.C., where the reports containing the alleged misstatements and omissions were filed with the SEC. Venue in the Southern District of New York was proper, as this was where the documents were prepared and signed. *See United States v. Mendel*, 746 F.2d 155, 165 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985).

Sixth, there is no merit to Bilzerian's claim that the government failed to prove an offense under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (1988) ("Section 10(b)") or Rule 10b-5, which prohibit fraudu-

lent practices in connection with the purchase or sale of a security, because it failed to prove a "fraud" within the meaning of the provisions. He contends there was no fraud because his misstatements and omissions were not material, and that no rational jury could have found materiality. The determination of materiality generally is a jury issue. In accordance with the teachings of *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), and *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988), the district court instructed the jury that a material fact "is one that would have been significant to a reasonable investor's investment decision." The jury's verdict was supported by ample evidence.

Finally, Bilzerian argues that his convictions for conspiracy in violation of 18 U.S.C. § 371 (1988) should be reversed because the same conduct cannot constitute both a conspiracy to defraud the United States and a conspiracy to commit substantive offenses. We rejected this argument in *United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987) and in *United States v. Williams*, 705 F.2d 603, 623-24 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983). There was ample evidence to support Bilzerian's convictions on both conspiracy counts.

WINTER, *Circuit Judge*, concurring in part and dissenting in part:

I concur in Judge Cardamone's disposition of the attorney-client privilege issue.

I also concur in the affirmance of the convictions based on violations of the securities laws. Although he is an estimable scholar, I believe that much of Professor Coffee's testimony was inadmissible. These portions consisted largely of legal opinions that should have been explored solely in the court's instructions to the jury. Moreover, the defense expert, Lee B. Spencer, a former Director of the SEC's Division of Corporate Finance, was prevented by the court from answering questions that were in principle indistinguishable from those answered by Professor Coffee. Nevertheless, Professor Coffee's testimony did not deviate in substance from the instructions given by the court to the jury and did not contain any matter that might otherwise prejudice the jury. I believe, therefore, that whatever error occurred was harmless.

With regard to the redirect examination of Murphy's regarding Bilzerian's personal tax return, I believe that the redirect examination was improper. The cross-examination of Murphy by Bilzerian's counsel concerned the partnership returns only and merely established that the source of Bilzerian's funds was irrelevant to the partnership tax returns. In no way did this cross-examination open the door for questions regarding Bilzerian's personal tax return, and the question was improper. Reluctantly, however, I have concluded that this error was also harmless. When Bilzerian took the stand, he was cross-examined about his personal tax returns and was able to provide an exculpatory explanation of pertinent events that blunted the impact of the redirect examination of Murphy.

I respectfully dissent from the conviction under 18 U.S.C. § 1001. I, of course, do not disagree with the gen-

eral canon relied upon by my colleagues that criminal statutes may overlap and that, when they do, the government may choose to indict under one rather than another. I cannot agree, however, that, because criminal statutes *may* overlap, Section 1001 *must* overlap with Section 32(a) of the 1934 Act. The bottom line is Congressional intent. Another canon of construction thus dictates that courts must insure that every part of a statute be given meaning and not be rendered superfluous. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Because we have construed Section 1001's prohibition on false statements as not requiring a finding of materiality, Section 32(a)'s prohibition on "false [statements] . . . with respect to any material fact" is superfluous. My colleagues' interpretation seems particularly questionable because the two provisions were the product of virtually simultaneous Congressional consideration and action and, at the time of passage, Section 1001 contained more stringent penalties. It certainly seems somewhat odd to me that Congress would pass Section 32(a), which specifically applies to filings required by the federal securities laws, and less than twelve days later render portions of it superfluous by passing a very general statute that required a lesser standard of proof and provided harsher penalties. With the exception of *United States v. Fields*, 592 F.2d 638 (2d Cir. 1978), the cases relied upon by my colleagues are from other circuits and involved false statements in ongoing investigations. *Fields*, moreover, does not stand for the proposition for which it is cited, because it deals only with the issue of materiality.

I therefore concur in part and dissent in part.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

88 Cr. 962 (RJW)

UNITED STATES OF AMERICA

-v-

PAUL A. BILZERIAN,

Defendant.

Defendant, Paul A. Bilzerian, moves for a new trial on three grounds. First, he argues that the Court's rulings on the attorney-client privilege were erroneous. Second, Bilzerian contends that the Court improperly admitted evidence of his inaccurate 1986 personal tax return. Finally, Bilzerian argues that the Court unfairly excluded certain testimony from a defense expert, and improperly admitted certain testimony from a Government expert. For the reasons hereinafter stated, defendant's motion is denied.

The Court Correctly Ruled On The Attorney-Client Privilege

Before taking the witness stand, Bilzerian sought a ruling from the Court that would have permitted him to testify on direct examination about his state of mind during the Cluett Peabody and Hammermill Paper transactions, particularly his good faith, while at the same time permitting him to assert the attorney-client privilege on cross-examination. The Court rejected Bilzerian's request, and indicated that any direct testimony by Bilzerian regarding his alleged "good faith" would open the

door to cross-examination by the Government as to the basis of that good faith, including advice that otherwise might have been protected from disclosure by the attorney-client privilege.

Defendant appears to have recognized that "[a] client who asserts that a challenged act was taken pursuant to the advice of a lawyer . . . cannot, with fairness and consistency, assert a privilege to immunize that advice from scrutiny." American Law Institute, Restatement of the Law Governing Lawyers, Tentative Draft No. 2 (April 7, 1989), Section 130, Comment C. Accordingly, defense counsel advised the Court that Bilzerian was not asserting an advice of counsel defense. However, Bilzerian was not entitled to block the Government's cross-examination concerning any advice he had been given simply by disavowing reliance on an "advice of counsel" defense. The attorney-client privilege may also be waived to a limited extent when the client asserts a defense of good faith. *See Hearn* v. *Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975); *Haymes* v. *Smith*, 73 F.R.D. 572 (W.D.N.Y. 1976); *United States* v. *Exxon Corp.*, 94 F.R.D. 246 (D.D.C. 1981). In such cases, "the party asserting the privilege [has] placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would [be] manifestly unfair to the opposing party." *Hearn* v. *Rhay*, *supra*, 68 F.R.D. at 581.[1]

---

[1] In *Hearn* v. *Rhay*, the Court stated that a party asserting the attorney-client privilege should be deemed to have waived it when the following three conditions exist:

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting part; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Hearn v. *Ray*, *supra*, 68 F.R.D. at 581.

In the instant case, Bilzerian sought to assert the attorney-client privilege to limit cross-examination on a matter that he intended to raise for his own benefit during his direct testimony. Bilzerian proposed to testify on direct examination that he had acted in good faith. That testimony, if credited by the jury, would have constituted a complete defense to the securities fraud charges in the indictment. *See* Sand, *Modern Federal Jury Instructions*, Instruction 57-25 ("[G]ood faith on the part of a defendant is a complete defense to a charge of securities fraud.").

Prior to Bilzerian's taking the stand, the Government had established, without objection, that Bilzerian consulted counsel in connection with the Cluett Peabody and Hammermill Paper transactions. Thus, there was a basis for inquiring about any advice he may have received. If, for example, Bilzerian had been advised by counsel that he should not act as he did and Bilzerian proceeded to act contrary to this advice, the advice would have been relevant on the issue of Bilzerian's good faith. If Bilzerian had been advised by counsel that he should act as he did and Bilzerian followed this advice, the advice would likewise have been relevant on the issue of Bilzerian's good faith. If he had told counsel that he did not desire counsel's advice, this too would have been relevant on the issue of Bilzerian's good faith. Accordingly, the Court correctly ruled that if Bilzerian testified on direct examination concerning his state of mind, the Government would be permitted to inquire into the basis of Bilzerian's purported good faith, including any advice he received from counsel on the subject.

Evidence Regarding Bilzerian's Filing Of An Inaccurate Tax Return Was Properly Admitted

The defense cross-examination of Brian Murphy elicited testimony that Bilzerian's partnership tax returns were accurate. This testimony created the false impres-

sion that Bilzerian had accurately reported his income from the Hammermill Paper transaction on his personal tax returns. After ruling that the door had been opened on this issue by the cross-examination, the Court permitted the Government to rebut that false impression on redirect examination by eliciting testimony from Murphy regarding Bilzerian's failure to report $4 million in income from the Hammermill Paper transaction on his 1986 personal tax return.

As the Second Circuit recently reiterated in *United States* v. *Wong*, Dkt. No. 88-1100 (2d Cir. June 1, 1989):

> "Redirect examination may be used to rebut false impressions that arise from cross-examination, *cf. United States* v. *Martinez*, 775 F.2d 31, 37 (2d Cir. 1985), and the scope of such an examination is a matter confided to the district court's discretion, *see United States* v. *Lubrano*, 529 F.2d 633, 637 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976)."

Id. slip op. at 7547, (quoting *United States* v. *Wiley*, 846 F.2d 150, 156 (2d Cir. 1988)); *accord United States* v. *Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

Bilzerian argues that his cross-examination covered only the accuracy of his partnership returns, and that he did not open the door to a redirect examination regarding his personal return. However, since a partnership pays no income taxes, this argument is disingenuous. If the Government had not been permitted to inquire concerning Bilzerian's personal return, the jury would have been left with the false impression that all income had been duly reported and all income taxes had been paid. Having chosen to inquire concerning the accuracy of the partnership returns, Bilzerian opened the door to the reporting of the income by the partners on their personal tax returns and their payment of the taxes due on that income.

In addition to arguing that he did not "open the door" to the Government's redirect examination, Bilzerian contends that the evidence regarding his inaccurate tax return was inadmissible pursuant to Fed. R. Evid. 404(b), which prohibits the introduction of "other crimes, wrongs, or acts" for the purpose of proving a defendant's criminal propensity. *See e.g., United States* v. *Colon*, 880 F.2d 650, 656 (2d Cir. 1989); *United States* v. *Ortiz*, 857 F.2d 900, 903 (2d Cir. 1988), *cert. denied*, 109 S.Ct. 1352 (1989). The testimony regarding Bilzerian's inaccurate tax return was plainly not admitted for that improper purpose. As noted above, it was received in order to rebut the false impression that Bilzerian had created during cross-examination. Moreover, this Court gave a limiting instruction, to which Bilzerian acceded, in order to insure that the jury would not make improper use of the evidence.[2]

Equally without merit is Bilzerian's claim that the evidence of his inaccurate tax return should have been excluded under Fed. R. Ev. 403. As the Second Circuit has made clear, "[e]vidence whose probative value might not be though to outweigh its prejudicial effect if offered on direct examination may well be admitted during redirect examination 'for the purpose of rebutting the false impressions which resulted from . . . cross examination.'" *United States* v. *Martinez*, *supra*, 775 F.2d at 37, (quoting *United States* v. *Finkelstein*, *supra*, 526 F.2d at 527). As noted, the Government did not elicit testimony regarding Bilzerian's inaccurate tax return until after Bilzerian had opened the door to the subject during cross-

---

[2] The Court instructed the jury:

"With respect to the $4 million in income from the Hammermill transaction, to which Brian Murphy referred, I instruct you that this testimony is only to be considered in connection with your evaluating Mr. Murphy's testimony regarding his preparation of the partnership tax returns which Mr. Murphy testified were true and correct in all respects."

(Tr. 984).

examination. Furthermore, the Court gave the aforementioned limiting instruction to avoid confusion. Bilzerian opposed another limiting instruction, which the Government had suggested, advising the jury that Bilzerian was not charged with intentionally underreporting the $4 million in income on his personal tax return. (Tr. 972).[3]

Thus, Bilzerian cannot now complain that the jury may have been confused, and "may well have received the Hammermill tax testimony as direct evidence" of the tax conspiracies charged in the indictment. (Bilzerian Memorandum at p. 32).

The Court's Rulings Concerning Expert Testimony On Securities Law Matters

The third ground Bilzerian presents as a basis for requesting a new trial is that the Court erroneously applied the standards established by the Second Circuit governing expert testimony. Bilzerian argues that the Court unfairly limited the testimony of Lee B. Spencer, Jr., an expert in securities law, called by the defense, after having allowed Professor John C. Coffee, the Government's expert, improper latitude.

The Court's Rulings Limiting Spencer's Testimony Were Correct

Bilzerian contends that the Court misapplied the Second Circuit's decisions in *United States* v. *Scop*, 846 F.2d 135 (2d Cir.), *modified on rehearing*, 856 F.2d 5 (1988),

---

[3] The Government suggested the following instruction:

"With respect to the $4 million in income from the Hammermill transaction to which Brian Murphy referred I instruct you there is no allegation in this case or in the indictment that Mr. Bilzerian intentionally under-reported this income or this $4 million on his 1986 personal tax return."

(Tr. 972). The defendant objected to this instruction. Accordingly, the instruction was not given.

and *Marx & Co.* v. *Diner's Club, Inc.*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977), in ruling that Spencer could not testify as to the accepted meaning of the term "personal funds" in the securities industry.

Defendant argues that *Marx* established the proposition that "[t]estimony concerning the ordinary practices of those engaged in the securities business is admissible to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry." *Marx & Co.* v. *Diner's Club, Inc.*, *supra*, 550 F.2d at 509. However, ultimate legal conclusions do not pass muster under *Marx* merely because they are presented as opinions concerning the "standards of ordinary practice in the industry." In *Marx*, the expert testimony found objectionable by the Second Circuit nominally concerned industry custom but went on to include legal matters reserved for the Court.

The testimony that Bilzerian sought to elicit from Spencer and which the Court excluded, sought Spencer's opinion concerning the legal propriety of describing unsecured loans as "personal funds" on a Schedule 13D filing.[4]

As defense counsel explained at sidebar:

> "The expert testimony that I would proffer would come from this witness goes to the, in this area, goes

---

[4] Bilzerian particularly focuses on the Court's ruling with respect to the following question by Mr. Mathews:

> "Q. Mr. Spencer, what is your understanding as an expert practicing in this area for many years as to the meaning in the industry of the term 'personal funds'?"

(Tr. at 2246-47.) The Court sustained an objection by the Government to this question, and stated that it was doing so "as to form." (Tr. at 2247.) Following several unsuccessful attempts by counsel to sharpen and establish the proper predicates for this question, the line of inquiry moved from the general understanding in the industry to the advice Mr. Spencer would give a client on the "personal funds" disclosure issue (Tr. at 2249). At that point, the Court held a conference at sidebar.

> to the accepted meaning and scope of the phrase "personal funds" and it would be, and I proffer that his response would be that in his experience, running the division of corporate finance, and in private practice, that it was *deemed appropriate under SEC interpretation and rules* to treat funds received in a recourse loan, unsecured, to purchase securities, as personal funds." (Tr. at 2252) (emphasis added).

There can be little question that the testimony Bilzerian sought to elicit from Spencer, as proffered by counsel, relates directly to the legality of Bilzerian's actual 13D disclosures under governing SEC rules and regulations and did not merely concern a definition of the term "personal funds" unique to the securities industry. Accordingly, the proffered testimony would have constituted an impermissible jury instruction on governing law.

Bilzerian complains that, in contrast, Professor Coffee was permitted by the Court to testify as to the common usage in the securities industry of such terms as "capital contribution," "open-market" and "privately negotiated." (*See, e.g.*, Tr. at 426, 428, 444). In each instance, the Government merely sought to elicit the meaning of phrases that are not commonly used in business or personal contexts outside the securities and finance arena. The Government never sought Professor Coffee's opinion as to whether it would be appropriate to employ any of those phrases on a Schedule 13D under specific circumstances.

Moreover, the Court's rulings with regard to the disputed Spencer testimony did not prejudice Bilzerian in any respect because Bilzerian ultimately was permitted to elicit Spencer's opinion as to whether unsecured recourse loans could appropriately be disclosed as "personal funds" in a Schedule 13D. At the close of Spencer's direct testimony, defense counsel elicited the following testimony:

"Q. . . . Mr. Spencer, I direct your attention to page 595 of Professor Coffee's redirect examination by Mr. Brodsky in this case . . . starting at line 6 on page 595

> 'Q. Say Howard Hughes decided to go ahead and become a limited partner in someone's limited partnership and he gave the limited partnership a billion dollars and then the person, the general partner, the one who is running the limited partnership filed a 13D—bought stock with Howard Hughes's money and filed a 13D. Could that filer claim that the billion dollars was his personal funds?'
>
> Professor Coffee's answer [:]
>
> 'I don't see how you can say that Howard Hughes's money is your own personal funds.'
>
> What response, Mr. Spencer, do you have to that question?

A. I would say the appropriate response would be working capital.

Q. Working capital of the limited partnership?

A. Yes, sir.

Q. What do you call working capital of an individual?

A. Personal funds."

(Tr. at 2281-82.)

The thrust of Spencer's answers in this exchange was that unsecured recourse loans could properly be disclosed as "working capital" by a limited partnership and as "personal funds" by an individual. That is precisely the testimony Bilzerian now argues he was not allowed to present to the jury.

In sum, the Court correctly ruled that the testimony counsel proffered to the effect that it would be "appropriate under SEC interpretations and rules" to disclose unsecured recourse loans as "personal funds" on a Schedule 13D would have constituted legal instruction to the jury inadmissible under *Scop* and *Marx*. Bilzerian's effort to present the proffered testimony as "customs and practices" testimony mischaracterizes the thrust of what counsel stated he was seeking to elicit and fails to demonstrate the clear error Bilzerian must show given the Court's broad discretion to exclude expert testimony. Finally, even assuming arguendo that the Court's ruling was incorrect, Bilzerian suffered no harm as Spencer was ultimately allowed to state his opinion concerning Bilzerian's "personal funds" disclosures, a point that was vigorously argued to the jury in the defense summation.

The Court's Rulings Concerning the Testimony of Professor Coffee Were Correct

Bilzerian also claims that the Court improperly admitted testimony from Professor Coffee as to the law governing the case and hypotheticals that Bilzerian argues were unduly suggestive.

With regard to his claim that Professor Coffee was permitted to testify on the law governing the case, Bilzerian focuses in particular on Professor Coffee's testimony concerning the requirements of Item 3 (relating to disclosure of source of funds) and Item 6 (relating to arrangements and understandings with others) of Schedule 13D. (*See* Tr. at 384-85, 599-600.) The Court would note that Professor Coffee was the first government witness. His testimony preceded any evidence concerning the actual transactions at issue in the case and provided factual background concerning the structure of Schedule 13D, the philosophy behind its disclosure requirements and the meaning of certain terms. The testimony provided assistance to a jury unfamiliar with the overall

nature and purpose of the securities and takeover laws, and thus met the test for admitting expert testimony established by Fed. R. Evid. 702. *See generally* 3 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 702[2] (1988).

The cases cited by Bilzerian for the proposition that it was error to admit Professor Coffee's general testimony on Schedule 13D each involved conclusions by experts couched in the language of the statutes or rules governing the case. *See, e.g., United States* v. *Scop, supra*, 846 F.2d at 138 (error to permit expert witness to opine that specific stock was "manipulated" and that defendants engaged in "manipulative and fraudulent scheme in furtherance of that manipulation" where defendant was charged with securities fraud) *FAA* v. *Landy*, 705 F.2d 624, 632 (2d Cir.), *cert. denied*, 424 U.S. 895 (1983) (trial court properly excluded expert testimony as to meaning and applicability of FAA regulations)[5]; *Marx & Co.* v. *Diner's Club, Inc., supra*, 550 F.2d at 509-10 (expert witness improperly testified as to legal meaning of terms used in contract that was central to the case).

In his testimony relating to Items 3 and 6 in Schedule 13D, Professor Coffee did not attempt to instruct the jury as to legal obligations or results. With respect to Item 3, Professor Coffee explained the meaning of the directions requiring disclosure if any part of the purchase price of the securities is represented by "funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, trading or voting the securities . . . ." (Tr. at 385.) His explanation focused on the general scope of the Item and, implicitly, the intent behind the Item's provisions, rather than on the application of the Item's language to any facts specific to Bilzerian's transactions.

---

[5] The *Landy* court also found the part of the excluded expert testimony relating to industry practice irrelevant because the regulations at issue embodied a strict liability standard. 705 F.2d at 632.

As the Court pointed out at sidebar immediately following Professor Coffee's testimony concerning Item 3,[6] at a point that is difficult to define, a general exposition by an expert witness on the language and requirements of Schedule 13D can evolve into assertions resembling legal instructions. Accordingly, the Court decided to limit further testimony by Professor Coffee concerning the Items contained in a Schedule 13D. The Court ruled that (1) the jury should be given a cautionary instruction and (2) that the jury should be allowed an opportunity to read Items 3 and 6 on Schedule 13D and to indicate to the Court whether there were any terms therein they did not understand.[7] The Court's cautionary

---

[6] The Court stated:

"I would like to get back to something. I certainly have no problem with this witness explaining the overall picture, and he did that. He is now doing something that is more troublesome." (Tr. at 388.)

[7] The Court's cautionary instruction was as follows:

"Ladies and gentlemen, we have just had a side bar as you are aware. I would like to instruct you as follows: Professor Coffee is here to furnish you with background concerning the meaning of terms, the procedures which are followed and his opinion as to the reasons for these procedures.

He is not here to give his opinion as to what the law requires. That is a matter which must be presented to you by the court. It is your obligation to take the court's instructions as to the law and then apply them to the facts as you find them." (Tr. at 394-95.)

Following this instruction, the Court asked the jury to read Items 6 and 7 of Schedule 13D. After some questioning by the Court concerning Item 6, which is addressed below, the Court once again cautioned the jury: "Keep in mind that as far the legal significance of any of this, I will instruct you on all legal matters prior to the case being given to you." (Tr. at 398.) The Court then asked the jury whether any of them had questions relating to either of these Items. They indicated that they did not. (Tr. at 398-99.)

instructions to the jury, coupled with the limitations it imposed on the remainder of Professor Coffee's testimony, overcame any possible prejudice to Bilzerian created by Professor Coffee's testimony concerning Schedule 13D.

Bilzerian also objects to Professor Coffee's testimony in general, noting instances where he claims that Professor Coffee was permitted to testify on impermissible matters, including what Bilzerian claims were "inaccurate descriptions of the general requirements of the securities laws" and "generic summaries of the congressional intent underlying those laws." (Bilzerian Memorandum at 51) (citations omitted). Counsel for Bilzerian did not object at trial, specifically or generally, to any of the cited testimony. As a result, Bilzerian waived any objection to that testimony. *See e.g., United States* v. *Heinemann*, 801 F.2d 86, 96 (2d Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

Even if counsel for Bilzerian had timely objected to the cited testimony, the Court would have been correct to overrule the objections. As noted above, since the average juror has little familiarity with the securities laws and would be assisted by orientation as to the structure of such laws and the philosophy underlying them, the testimony was proper under Fed. R. Evid. 702.

Bilzerian's other area of objection to Professor Coffee's testimony focuses on hypothetical questions posed during redirect examination. In particular, Bilzerian challenges Professor Coffee's responses to the "Howard Hughes" hypothetical. (*See* Tr. at 595-597.) Bilzerian is incorrect that expert testimony concerning a hypothetical question falls "squarely" within the prohibitions established in *Scop* and *Marx*. In no sense did Professor Coffee's response to the hypothetical make use of "statutory and regulatory language indicating guilt." *See United States* v. *Scop*, *supra*, 846 F.2d at 142.

Bilzerian's arguments also ignore the fact that the "Howard Hughes" hypothetical was first posed by defense counsel during Professor Coffee's cross-examination. (*See* Tr. at 534-35.) Professor Coffee was asked whether the identity of Howard Hughes, assumed to be a limited partner who made a large capital contribution to a limited partnership that was filing a Schedule 13D, would have to be disclosed. Professor Coffee answered that it would not. *Id.* This hypothetical came as close to the facts later established at trial as the hypothetical put to Professor Coffee during redirect examination.[8] The Government's redirect examination on this hypothetical was proper in that it sought to clarify the misimpression created by the cross-examination that insulating a "Howard Hughes" financial backer through the device of a limited partnership would free a 13D filer from all disclosure concerning the backer's financial support.

Bilzerian's argument also ignores the fact that he was permitted to put the identical hypothetical to Spencer, whose responses directly contradicted those of Professor Coffee. (Tr. at 2281-82). Counsel for Bilzerian argued to the jury in summation that this constituted a critical moment in Bilzerian's defense. Given that the jury was instructed by the Court not to take the law from the experts, Bilzerian's defense was not prejudiced. Accordingly, Bilzerian's new trial motion is in all respects denied.

It is so ordered.

Dated: New York, New York /s/ Robert J. Ward
September 26, 1989 U.S.D.J.

---

[8] Evidence admitted later in the trial demonstrated that Bilzerian had restructured the vehicles through which certain of his silent partners in the Cluett Peabody transaction had invested as limited partnerships.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 22nd day of February, one thousand nine hundred and ninety-one.

Docket Number 89-1502

UNITED STATES OF AMERICA,
Appellee,

v.

PAUL A. BILZERIAN,
Defendant-Appellant.

[Filed Feb. 22, 1991]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant PAUL BILZERIAN.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. § 371 Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1001 Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in con-

travention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78m Reports by persons acquiring more than five per centum of certain classes of securities

* * * *

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for

the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an

amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions

by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

* * * *

15 U.S.C. § 78n. Tender offer by owner of more than five per centum of class of securities; exceptions

* * * *

(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g) (2) (G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the informa-

tion specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission

may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to the tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

* * * *

15 U.S.C. § 78ff. Penalties

Willful violations; false and misleading statements

(a) Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than five years, or both, except that when

such person is an exchange, a fine not exceeding $500,000 may be imposed, but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

[Version in effect before 1988; subsequent amendments not relevant to this case.]

17 C.F.R. § 240.10b-5

Rule 10b-5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

No. 90-1803

Supreme Court, U.S.
FILED
AUG 6 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

PAUL A. BILZERIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SIDNEY M. GLAZER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court violated petitioner's attorney-client privilege when it indicated, in response to petitioner's requests for anticipatory evidentiary rulings, that if petitioner testified that he acted in good faith in making false statements in SEC filings he would be subject to cross-examination regarding pertinent communications with his attorneys.

2. Whether materiality is an element of all offenses defined by the false statement statute, 18 U.S.C. 1001.

3. Whether false statements in informational reports filed with the SEC are subject to prosecution under the general false statement statute, 18 U.S.C. 1001.

4. Whether the conspiracy count of the indictment was defective in charging petitioner with a conspiracy both to commit specified offenses and to defraud the United States.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	13
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Brown v. *United States*, 356 U.S. 148 (1958)	15
Dennis v. *United States*, 384 U.S. 855 (1966)	25
Fitzpatrick v. *United States*, 178 U.S. 304 (1900)	15
Harris v. *New York*, 401 U.S. 222 (1971)	15
Hearn v. *Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)	16, 17
Hunt v. *Blackburn*, 128 U.S. 464 (1888)	16
Johnson v. *United States*, 542 F.2d 941 (5th Cir. 1976), cert. denied, 430 U.S. 934 (1977)	16, 17
Kungys v. *United States*, 485 U.S. 759 (1988)	22, 23
Luce v. *United States*, 469 U.S. 38 (1984)	13, 14, 15
McGautha v. *California*, 402 U.S. 183 (1971)	15
Rogers v. *United States*, 340 U.S. 367 (1951)	15
Russell v. *Curtin Matheson Scientific, Inc.*, 493 F. Supp. 456 (S.D. Tex. 1980)	17
Sedco Int'l, S.A. v. *Cory*, 683 F.2d 1201 (8th Cir.), cert. denied, 459 U.S. 1017 (1982)	16, 17
Sinclair v. *United States*, 279 U.S. 263 (1929)	22
Tanner v. *United States*, 483 U.S. 107 (1987)	25
TSC Industries, Inc. v. *Northway, Inc.*, 426 U.S. 438 (1976)	23
United States v. *Abadi*, 706 F.2d 178 (6th Cir.), cert. denied, 464 U.S. 821 (1983)	22
United States v. *Anderez*, 661 F.2d 404 (5th Cir. 1981)	24
United States v. *Batchelder*, 442 U.S. 114 (1979)	23
United States v. *Clark*, 918 F.2d 843 (9th Cir. 1990)	22
United States v. *Corsino*, 812 F.2d 26 (1st Cir. 1987)	21

Cases—Continued: Page

United States v. *Daily*, 921 F.2d 994 (10th Cir. 1990) 22
United States v. *Elkin*, 731 F.2d 1005 (2d Cir.), cert. denied, 469 U.S. 822 (1984) 21
United States v. *Gilliland*, 312 U.S. 86 (1941) 23
United States v. *Gordon*, 548 F.2d 743 (8th Cir. 1977) 24
United States v. *Grotke*, 702 F.2d 49 (2d Cir. 1983) 24
United States v. *Hansen*, 772 F.2d 940 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986) 24
United States v. *Hartness*, 845 F.2d 158 (8th Cir.), cert. denied, 488 U.S. 925 (1988) 24
United States v. *Jones*, 933 F.2d 807 (10th Cir. 1991) 22
United States v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989) 25, 26
United States v. *Nobles*, 422 U.S. 225 (1975) 15
United States v. *Reynolds*, 919 F.2d 435 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991) 26
United States v. *Rinaldi*, 393 F.2d 97 (2d Cir. 1968) 21
United States v. *Silver*, 235 F.2d 375 (2d Cir.), cert. denied, 352 U.S. 880 (1956) 21
United States v. *Valdez*, 594 F.2d 725 (9th Cir. 1979) 22
United States v. *White*, 887 F.2d 267 (D.C. Cir. 1989) 18
United States v. *Woodall*, 438 F.2d 1317 (5th Cir. 1970), cert. denied, 403 U.S. 933 (1971) 16, 17
Upjohn v. *United States*, 449 U.S. 383 (1981) 19
Walder v. *United States*, 347 U.S. 62 (1954) 15

Statutes, regulations and rule

Act of Feb. 22, 1935, ch. 18, § 6, 49 Stat. 32 24
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 10(b), 15 U.S.C. 78j(b) 2
§ 32, 15 U.S.C. 78ff 2, 12
§ 32(a), 15 U.S.C. 78ff(a) 23

Regulations and rule—Continued: Page

18 U.S.C. 371 ..... 2, 12, 24, 25, 27
18 U.S.C. 1001 ..... 20, 21, 22, 23, 24
17 C.F.R. 240.13d-1 *et seq.* 3
Fed. R. Evid. 106 10

Miscellaneous:

S. Stone & R. Liebman, *Testimonial Privileges* (1983) 16, 17

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1803

PAUL A. BILZERIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 926 F.2d 1285. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 37a-50a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1991. A petition for rehearing was denied on February 22, 1991 (Pet. App. 51a). The petition for a writ of certiorari was filed on May 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; five counts of concealing material facts and making false statements on matters within the jurisdiction of the Securities and Exchange Commission, in violation of 18 U.S.C. 1001; and two counts of conspiracy to commit various specified offenses and to defraud agencies of the United States, in violation of 18 U.S.C. 371. Petitioner was sentenced to four years' imprisonment and was fined a total of $1,500,000.[1]

1. The evidence at trial established that petitioner engaged in a series of fraudulent transactions in securities issued by four companies. To further and conceal his schemes, petitioner submitted false reports to the SEC, filed a false tax return with the IRS, and exchanged false invoices with his broker.

a. In 1985, petitioner acquired control over 24 percent of the shares of Cluett, Peabody & Co., Inc., and made a tender offer for the remaining shares. In December, he sold his position, realizing a reported trading profit of approximately $7 million. In connection with his dealings in Cluett shares, petitioner engaged in several fraudulent schemes. Gov't C.A. Br. 4.

---

[1] The court imposed concurrent four-year terms of imprisonment on both securities fraud counts, both conspiracy counts, and two of the false statement counts, and it fined petitioner $250,000 on each of those counts. We do not agree with petitioner's assertion that a ruling in his favor on the first question presented would require reversal of all of his convictions. See Pet. 6-7 n.3; Gov't C.A. Br. 26-27.

In April and May 1985, petitioner raised $9 million from Edward J. DeBartolo, Sr., and other individual investors to purchase Cluett shares. The funds were provided by means of trusts; petitioner promised that the investors would receive half the profits from the sale of the shares and guaranteed them against loss. Petitioner used those funds to purchase 581,000 shares on margin for approximately $30 per share. Pet. App. 3a; Gov't C.A. Br. 4-5.

By mid-May 1985, petitioner had control over 4.3 percent of Cluett's stock. Under SEC regulations, any investor who acquires beneficial ownership of 5 percent or more of a publicly traded company must make a Schedule 13D filing that discloses, among other things, the source of the funds and agreements of the sort petitioner had made with the investors. See 17 C.F.R. 240.13d-1 *et seq.*; Pet. App. 20a-21a. To avoid disclosure of his purchases, which might have driven up the price of the stock, petitioner arranged to have a broker, Jefferies & Company, Inc., "accumulate" shares for him.[2] Acting as petitioner's nominee, Jefferies accumulated 302,000 shares in one of its accounts, receiving approval from petitioner for each purchase. Petitioner then "purchased" the shares from Jefferies at its cost, plus interest and commissions. Pet. App. 4a; Gov't C.A. Br. 6-7.

Petitioner capitalized on the accumulation arrangement to delay the Schedule 13D filing. The filing that petitioner ultimately made was false and mis-

[2] Under an "accumulation" agreement, the broker purchases shares for its account, but the party in interest (here, petitioner) agrees to purchase them for the broker's cost, plus interest and commissions. Although the shares are in the broker's name, the broker is protected from market risk and acts essentially as a nominee.

leading in two respects: It represented that the Cluett shares had been purchased with "personal funds" rather than funds supplied by investors, and it misstated the date when petitioner's holding reached 5 percent, thereby concealing the accumulation agreement. Pet. App. 3a-4a; Gov't C.A. Br. 5-7.

In October 1985, petitioner made a $40 per share cash tender offer, which he hoped would induce a "white knight"—a competing offeror supported by the company's management—to purchase his shares for a premium. The offering statement represented that petitioner had purchased 347,567 Cluett shares "in an open market transaction" at $38 per share. In truth, the purchase was actually a privately negotiated transaction between petitioner and a group of wealthy investors headed by DeBartolo; petitioner had not paid for the shares, because the transaction was not subject to settlement for 45 days; the transaction was subject to cancellation if another party offered a price in excess of petitioner's tender offer; the price was $40 per share, not $38 (a discrepancy petitioner sought to conceal with false documentation); and 66,667 of the shares included in this block were already under petitioner's control. Pet. App. 4a; Gov't C.A. Br. 7-8.

In December 1985, petitioner sold the 581,000 shares he had purchased for $40 per share and divided the profit of $10 per share with the investors who had supplied the funds. In connection with his role in the Cluett transactions, petitioner was charged with one securities fraud count and three false statement counts; the Cluett schemes were also the subject (along with other matters) of one conspiracy count. Pet. App. 4a.

b. From June to September 1986, petitioner acquired control of 20 percent of the common stock of

Hammermill Paper Company, which he sold for a reported trading profit of $58 million. As in the case of Cluett, petitioner concealed the source of his funds and engaged Jefferies to accumulate stock as his nominee in order to conceal his activity. Gov't C.A. Br. 9.

In June 1986, petitioner used $8 million supplied by DeBartolo pursuant to a profit-sharing agreement and a trust, and other funds, to purchase 803,275 shares on margin. When his holdings reached 4.9 percent of Hammermill's shares, petitioner arranged for Jefferies to accumulate additional shares as his nominee, in order to delay filing the SEC report disclosing his holding of more than 5 percent of Hammermill's shares. After his position (including the shares accumulated by Jefferies) had passed the 5 percent mark, petitioner continued to purchase shares from unknowing investors. Petitioner "purchased" the accumulated shares from Jefferies on July 21, 1986. Because the market price on that day was higher than the price due Jefferies (its cost plus interest and commissions), petitioner instructed Jefferies to execute the trade after the New York Stock Exchange closed for the day. Although he was required to disclose his position no later than July 7, petitioner did not file the required SEC report until July 25. The report falsely represented that petitioner had used "personal funds" to purchase Hammermill shares and that petitioner attained his 5 percent position only when he acquired the accumulated shares from Jefferies. Pet. App. 5a; Gov't C.A. Br. 9-11.

Petitioner sold his 803,275 Hammermill shares to a "white knight" in September 1986, realizing a profit of approximately $23 per share. Petitioner

shared the profit with DeBartolo. The Hammermill transactions were the subject of one securities fraud count, two false statement counts, and (together with the Cluett transactions) a conspiracy count. Pet. App. 5a; Gov't C.A. Br. 10.

c. In 1985, petitioner arranged to "park" 58,000 shares of H.H. Robertson Co. stock with Jefferies for 31 days, in order to claim a tax loss while retaining control over the stock.[3] Although petitioner assured Jefferies he would repurchase the stock, the stock price fell substantially in the interim and petitioner refused to honor his commitment. As a result, Jefferies incurred a $250,000 loss. To resolve the resulting dispute, the individual who had referred petitioner to Jefferies, John LeFrere, agreed to generate $250,000 in commissions for Jefferies. By December 1985, LeFrere had generated approximately $125,000 in commissions. Jefferies insisted that petitioner make up the difference by the end of the year. Petitioner agreed to pay Jefferies $125,000 on the condition that the payment would be refunded as LeFrere generated additional commissions in 1986. To conceal the true nature of the payment, Jefferies sent petitioner a false invoice for consulting services in the amount of $125,000, which petitioner claimed as an expense on a 1985 partnership tax return. By March 1986, LeFrere had generated an additional $125,000 in commissions. Seeking the return of his payment, petitioner sent Jefferies two false invoices for con-

[3] "Parking" refers to a transaction in which a broker-dealer buys stock from a customer with the understanding that the customer will buy the stock back at a later date for the purchase price plus interest and commissions. As in the case of an accumulation agreement, the broker-dealer assumes no market risk and acts only as the nominal owner of the shares.

sulting services that he had not performed. Pet. App. 5a-6a; Gov't C.A. Br. 11-12.

Petitioner also arranged to "park" 306,000 shares of Armco Steel stock with Jefferies for a 30-day period beginning September 2, 1986. As in the case of the Robertson parking arrangement, petitioner sought to claim a tax loss without actually relinquishing the stock. While his Armco shares were parked with Jefferies, petitioner also arranged to have Jefferies accumulate shares on his behalf. On October 1, 1986, petitioner "purchased" the parked stock and the accumulated stock—a total of 818,900 shares—at the then-market price of $8 per share. Under the formulas prescribed by the parking and accumulation agreements, however, petitioner owed Jefferies only $7.30 per share. To recover the difference, while concealing the scheme, petitioner sent Jefferies a false invoice for consulting services that he had not performed. Pet. App. 6a; Gov't C.A. Br. 13.

In connection with the Robertson and Armco transactions, the indictment charged that petitioner conspired to defraud the SEC and the IRS and to commit violations of the Securities Exchange Act and the false statement statute. Pet. App. 6a.

2. a. At trial, petitioner testified in his own defense. In a motion *in limine*, he sought a ruling that he could testify that he believed in good faith that it was lawful to describe the money supplied by investors for the Cluett and Hammermill transactions as "personal funds" without exposing himself to cross-examination concerning communications with his attorney on that subject. The government's evidence showed that petitioner had consulted with counsel regarding his SEC filings, and petitioner had testified before the SEC in 1988 that he believed his

description was legitimate, based on conversations with counsel as to which he asserted attorney-client privilege. In connection with the motion *in limine*, however, petitioner disavowed an advice-of-counsel defense and asserted that he would not identify the basis for his alleged good faith belief. Tr. 2340-2341. See Pet. App. 39a.

The trial court ruled that if petitioner testified that he acted in good faith with respect to the Cluett and Hammermill transactions, he would be subject to cross-examination regarding the basis for that state of mind, including communications with his attorney. Pet. App. 7a. The court reasoned that "[i]n order to make a fair evaluation of a person's state of mind, you have to know what was in his mind, therefore, it seems to me * * * his testimony may open the door." Tr. 2344. See Tr. 2346, 2348-2349.

As the trial progressed, petitioner sought additional anticipatory rulings on the manner in which the court's privilege determination would apply to particular lines of inquiry.

First, petitioner proposed to testify about steps he took to restructure investor financing in Cluett and Hammermill, in order to suggest to the jury that he believed his descriptions of the transactions were lawful. See Pet. App. 12a-13a. The prosecutor pointed out that on the facts of this case, such testimony would be "just one step removed" from testimony as to state of mind itself. Tr. 2419. The court indicated that if petitioner was asked what he did to restructure the Cluett and Hammermill transactions, it would "open[] the door to * * * cross-examination on why he did it." *Ibid.* The court added, however, that "[w]hat he did is really in the record already[,]

having been put there by [other witnesses]." *Ibid.* Thereafter, petitioner provided some testimony regarding the structure of the Cluett and Hammermill transactions, but he was not cross-examined on any attorney-client communications. See Gov't C.A. Br. 17-18.

Second, before redirect examination, defense counsel sought an assurance from the court that any testimony petitioner might give with respect to prior SEC testimony on which he had been cross-examined would not open the door to recross-examination regarding his communications with counsel. The court responded that it would "not * * * really attempt to supply an advisory decision," Tr. 2906, but noted that if petitioner's explanation of his SEC testimony entailed an assertion of good faith, "what you are doing then on redirect is precisely what you sought to do on direct examination," Tr. 2908. The court concluded (Tr. 2911):

> I am suggesting that you have a perfect right to do anything you want and I will give you ultimate latitude on redirect examination, but once you go beyond a certain point, and I can't measure that point for you now, you may open the door to [recross] examination.
>
> I cannot say any more than that because obviously we can't sit down and structure a redirect examination question by question and then choreograph a recross-examination the same way. It just doesn't work that way.

Third, petitioner then proposed to have petitioner "affirm" unspecified portions of his SEC testimony. Tr. 2914. Again, the trial court cautioned that the introduction of that evidence might justify cross-examination. Tr. 2915 ("I don't want you in pre-

paring your examination to just put down the questions and answers which may include all kinds of explanations without understanding that those explanations may very well give rise to an inquiry on recross-examination."). But the court concluded, "I want you to understand something very, very clearly. I am not making any definitive ruling or commitment on any of this." Tr. 2923. Following a recess, petitioner specified certain passages of his SEC testimony that he proposed to offer under Fed. R. Evid. 106. After an extended colloquy, the district court suggested, as a substitute, that petitioner respond to particular questions in a manner that would not open the door to attorney-client communications. Tr. 2930-2946. The court then reiterated its prior ruling that if petitioner testified that he acted in good faith with respect to the Cluett and Hammermill matters, he would be subject to full cross-examination. Tr. 2946-2949.

After the jury had returned guilty verdicts on all counts, the district court denied petitioner's motion for a new trial. Pet. App. 37a-50a. Explaining the basis for its prior rulings on the attorney-client privilege, the court stated that "if [petitioner] testified on direct examination concerning his state of mind, the Government would be permitted to inquire into the basis of [petitioner's] purported good faith, including any advice he received from counsel on the subject." *Id.* at 39a.

b. The false statement counts in the indictment charged that petitioner's SEC filings violated 18 U.S.C. 1001 in specified respects both by concealing "material facts" and by making false statements in a matter within the jurisdiction of the SEC. C.A. App. C, ¶¶ 24, 26, 28, 46, 48. The court instructed

the jury, in accordance with Second Circuit precedent, that the facts allegedly concealed were material but that it was not necessary for the government to prove materiality in order for the jury to convict petitioner of making a false statement. Pet. 16 n.21.

3. The court of appeals affirmed. Pet. App. 1a-36a. The court upheld the district court's rulings on the attorney-client privilege issue. The court of appeals noted that the privilege "may implicitly be waived when [a] defendant asserts a claim that in fairness requires examination of protected communications." *Id.* at 9a. That principle was applicable here, the court explained, because testimony that petitioner "thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue." *Id.* at 10a. The court of appeals noted that the district court's rulings did not preclude petitioner from arguing that the government failed to carry its burden of proving criminal intent. *Ibid.* Moreover, the court continued, the district court "took great pains to point out that application of the privilege would hinge on the testimony elicited on direct examination," and petitioner sought only "an advisory ruling in advance, assuring that the attorney-client privilege would not be waived regardless of what developed in his direct testimony." *Id.* at 11a. Under these circumstances, the court of appeals held, the district court did not abuse its discretion when it refused to grant petitioner "blanket protection from an implied waiver of the attorney-client privilege." *Id.* at 12a.[4]

---

[4] Judge Lumbard concurred in the affirmance of the conviction, substantially for the reasons set forth in the principal opinion. With respect to the attorney-client privilege issue, Judge Lumbard agreed with the other members of the panel

The court affirmed the convictions on the false statement counts by a 2-1 vote. The majority held that the statute is applicable to misstatements in reports filed with the SEC, even though such misconduct is also punishable under 15 U.S.C. 78ff. The court cited "settled law that 'when an action violates more than one criminal statute, the Government may prosecute either so long as it does not discriminate against any class of defendants.'" Pet. App. 25a; see *id.* at 33a (Lumbard, J., concurring in the judgment). The majority noted, in passing, that in the Second Circuit proof that a false statement was material is not required for a conviction under 18 U.S.C. 1001. Pet. App. 24a.[5]

Finally, the court rejected petitioner's contention that 18 U.S.C. 371 does not permit the government to charge a conspiracy to defraud the United States when the evidence would support a conviction for conspiring to violate a particular statute. Pet. App. 27a-29a. "Although it is recognized that the government may not obtain two convictions or punish the defendant twice for the same conduct by alleging violations of both the defraud and offense clauses of the conspiracy statute," the court explained, "it may

---

that "[i]f petitioner had asserted good faith on direct examination, he could not use the attorney-client privilege to avoid cross-examination regarding the basis of that claim." Pet. App. 31a. In addition, he concluded that "[b]ecause [petitioner] decided not to testify on these matters, his claims are not properly preserved for appeal." *Ibid.*

[5] Judge Winter dissented from the majority's holding that the false statement statute applies to statements on reports required by the Securities Exchange Act of 1934. Pet. App. 35a-36a.

simultaneously prosecute the same conduct under both clauses." *Id.* at 29a.[6]

ARGUMENT

1. Petitioner argues (Pet. 8-15) that the district court erred in its rulings regarding the extent to which petitioner's proposed testimony on good faith would open the door to cross-examination regarding his communications with his attorney.

a. At the outset, as Judge Lumbard concluded (Pet. App. 31a), petitioner failed to preserve this contention for appellate review. In *Luce* v. *United States*, 469 U.S. 38 (1984), the trial court ruled on a motion *in limine* that if the defendant testified he could be impeached with a prior conviction. The defendant did not take the stand, and this Court held that the trial court's ruling *in limine* was not subject to appellate review. The Court explained that "[a] reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context." *Id.* at 41. In particular, "[a]ny possible harm flowing from a district court's *in limine* ruling * * * is wholly speculative"; "[t]he ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer"; "the

---

[6] The court also rejected petitioner's challenges to certain evidence introduced at trial (Pet. App. 13a-18a); it found sufficient evidence to sustain a finding that misstatements on which the securities fraud convictions rested were material (*id.* at 18a-23a); it concluded that false statements on petitioner's Schedule 13D and 14D-1 filings were "within the jurisdiction" of the SEC (Pet. App. 26a-27a); it found that venue was proper (*id.* at 27a); and it rejected petitioner's challenge to the sufficiency of the evidence on the conspiracy counts (*id.* at 29a-30a). The petition does not seek further review of those rulings.

district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling"; and "[w]hen the defendant does not testify, the reviewing court also has no way of knowing" how the government would have proceeded. *Id.* at 41-42. In addition, the court noted, appellate review of *in limine* rulings would frustrate harmless error review, "result in the windfall of automatic reversal," and encourage defendants to make such motions "solely to 'plant' reversible error in the event of conviction." *Id.* at 42.[7]

The same reasoning forecloses review of the district court's rulings on petitioner's motions *in limine*. Indeed, in some respects, there is greater reason to be cautious in granting appellate review of *in limine* privilege claims than of the claims at issue in *Luce*. The extent to which a witness may waive a privilege and the resulting cross-examination are directly dependent upon the particulars of the witness's testimony. As the district court noted in this case, it is unreasonable to expect a district court to "sit down and structure a redirect examination question by question and then choreograph a recross-examination the same way." Tr. 2911. Further, whereas the trial and appellate courts were aware of the precise nature of the prior conviction at issue in *Luce*, the same is

---

[7] The Court noted that those considerations are "particularly true" in the case of prior convictions, since the Federal Rules of Evidence require the court to weigh the probative value and prejudicial effect of such evidence. 469 U.S. at 41. But that observation does not suggest, as petitioner argues (Pet. 12), that those concerns are inapplicable to claims of the type at issue here. This case does not, of course, involve a question of "constitutional dimensions" such as the admissibility of testimony obtained under a grant of immunity. See 469 U.S. at 42-43.

not true of the privileged information that might be subject to disclosure based upon an *in limine* privilege ruling. For that reason and because the prosecutor has little opportunity to challenge a defendant's proffer regarding the testimony he may claim to have withheld in reaction to such a ruling, a privilege claim presents defendants with a greater opportunity to "plant" reversible error in the record and to distort appellate review by overstating the effect of an *in limine* privilege ruling on the evidence. See *Luce* v. *United States*, 469 U.S. at 42. As in *Luce*, the better course is to withhold review of the inherently fact-specific issues presented by privilege claims unless they have been played out at trial.

b. In any event, the court of appeals was correct in rejecting petitioner's claim on the merits. When a person testifies with respect to matters that might otherwise be privileged, his "credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination." *Brown* v. *United States*, 356 U.S. 148, 154-155 (1958). See *United States* v. *Nobles*, 422 U.S. 225, 239-240 (1975); *McGautha* v. *California*, 402 U.S. 183, 215 (1971); *Harris* v. *New York*, 401 U.S. 222, 225 (1971); *Walder* v. *United States*, 347 U.S. 62 (1954); *Rogers* v. *United States*, 340 U.S. 367, 373 (1951); *Fitzpatrick* v. *United States*, 178 U.S. 304, 305 (1900). That principle is fully applicable to the attorney-client privilege.

Many cases recognize that a defendant is deemed to waive his attorney-client privilege by making an assertion whose fair and accurate resolution requires examination of otherwise confidential communica-

tions.[8] In this case, petitioner sought to testify that he believed it was lawful to represent in SEC filings that he had purchased Cluett and Hammermill shares with "personal funds," while at the same time limiting cross-examination into the basis for that belief and its possible inconsistency with advice he received from his attorneys. The district court was entirely correct in refusing to allow petitioner to have it both ways.[9]

---

[8] *E.g.*, *United States* v. *Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) (en banc), cert. denied, 403 U.S. 933 (1971); *Hearn* v. *Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). See *Sedco Int'l, S.A.* v. *Cory*, 683 F.2d 1201 (8th Cir.), cert. denied, 459 U.S. 1017 (1982); *Johnson* v. *United States*, 542 F.2d 941, 942 (5th Cir. 1976), cert. denied, 430 U.S. 934 (1977); S. Stone & R. Liebman, *Testimonial Privileges* § 1.50 (1983) (citing cases). Cf. *Hunt* v. *Blackburn*, 128 U.S. 464, 470-471 (1888).

[9] As the district court recognized, petitioner's testimony regarding his own state of mind would have opened several obvious lines of inquiry (Pet. 39a):

> If, for example, [petitioner] had been advised by counsel that he should not act as he did and [petitioner] proceeded to act contrary to this advice, the advice would have been relevant on the issue of [petitioner's] good faith. If [petitioner] had been advised by counsel that he should act as he did and [petitioner] followed this advice, the advice would likewise have been relevant on the issue of [petitioner's] good faith. If he had told counsel that he did not desire counsel's advice, this too would have been relevant on the issue of [petitioner's] good faith.

Even if counsel advised petitioner that his description of the Cluett and Hammermill transactions was lawful, the government would have been entitled to inquire whether petitioner had withheld facts relevant to that advice from his attorney. See Tr. 2408-2410 (prosecutor's description of appropriate lines of cross-examination).

The fact that petitioner disavowed an advice of counsel defense and indicated he would not refer expressly to attorney-client communications did not justify a different result. Petitioner proposed to testify to a state of mind that other evidence suggested was based upon (or inconsistent with) an attorney's advice.[10] An order allowing petitioner to make an unelaborated assertion of good faith without cross-examination into its basis and consistency with information available to him would have misled the jury. In light of evidence that petitioner had consulted with counsel regarding the Cluett and Hammermill transactions (see Pet. App. 39a), petitioner's proposed testimony could have left the jury with the impression that his asserted belief was consistent with what counsel had told him, or at least that counsel had not given him any pertinent legal advice.[11]

---

[10] Waiver principles discussed in text are not reserved for cases in which a party has invoked an advice-of-counsel defense. *United States* v. *Woodall*, 438 F.2d at 1324 (defendant's assertion that he was ignorant of the consequences of a guilty plea waived attorney-client privilege on that subject); *Johnson* v. *United States*, 504 F.2d at 942 (same); *Sedco Int'l, S.A.* v. *Cory*, 683 F.2d at 1206 (assertion of fraud may waive privilege as to communications showing that party did not rely on allegedly fraudulent statements or that reliance was unreasonable); *Hearn* v. *Rhay*, 68 F.R.D. at 581 (assertion of the defense of official immunity waives privilege as to advice on requirements of the law); *Russell* v. *Curtin Matheson Scientific, Inc.*, 493 F. Supp. 456, 458 (S.D. Tex. 1980) (assertion of equitable tolling defense waived privilege as to whether party learned of deadline for filing from attorney). See S. Stone & R.S. Liebman, *supra*, at § 1.50.

[11] It is not disputed that petitioner's asserted good-faith belief in the legality of his actions involved advice of counsel. See Tr. 2343. The prosecutor would have had a substantial basis for inquiring into communications with counsel.

The district court put its finger on the incongruity of the course petitioner proposed (Tr. 2351):

> How did he acquire his belief? Did he go to Delphi and consult with the oracle? If he did, no problem. If, on the other hand, he talked to A and B and C, one of whom was an attorney who he consulted and who he paid, and the input that he received from that attorney went into his ultimate belief, I suggest that the matter is appropriate for cross-examination.

c. There is no conflict between the court of appeals' decision here and the decision in *United States* v. *White*, 887 F.2d 267 (D.C. Cir. 1989). In *White*, the D.C. Circuit reversed a ruling that a non-testifying defendant waived the attorney-client privilege merely by "putting the government to its proof on the issue of criminal intent." *Id.* at 270. In this case, as the court of appeals noted, the district court did not find a waiver on the basis of petitioner's not guilty plea or his argument that the government had failed to prove criminal intent beyond a reasonable doubt; the district court "did not prevent [petitioner] from denying criminal intent." Pet. App. 10a. Rather, "the district judge merely said that [petitioner's] own testimony as to his good faith would open the door to cross-examination, possibly including inquiry into otherwise privileged communications." *Ibid.* *White* did not involve any testimony of that kind, and the court of appeals here did not hold, contrary to *White*, that a waiver may be based on nothing more than a general denial of criminal intent.[12]

---

[12] Needless to say, the Second Circuit does not limit a defendant's right to argue that the government has failed to prove criminal intent beyond a reasonable doubt, regardless of whether the defendant introduces any evidence. In sug-

d. Petitioner complains specifically (Pet. 13) about the district court's warning that testimony regarding the steps he took to restructure the Cleutt and Hammermill financing might expose him to cross-examination regarding the reasons he took those steps, including any role played by his attorneys' advice. In his view, the court of appeals failed to acknowledge that "[a] fact is one thing and a communication concerning that fact is an entirely different thing." *Upjohn* v. *United States*, 449 U.S. 383, 395-396 (1981).

The court of appeals recognized that distinction, but it also understood that under the circumstances of this case "the testimony about the changes would be inextricably intertwined with [petitioner's] assertion of good faith." Pet. App. 12a. In reaching that

---

gesting otherwise (Pet. 10-11 & n.7), petitioner obfuscates the distinction between the denial inherent in a defendant's not guilty plea and affirmative testimony regarding state of mind. See, *e.g.*, *id.* at 10 ("A defendant who asserts that he did not act with criminal intent necessarily asserts that he acted in good faith."). The court of appeals' opinion is crystal clear on this point. See Pet. App. 10a.

The district court also recognized the distinction (Tr. 2346-2347):

> The subject of [petitioner's] good faith was relevant because good faith is a defense. The government has a burden and it doesn't shift to the defendant.
>
> If the defendant determines to take the subject up, he is talking about his good-faith belief that something was proper. One forms a belief by making inquiry, either talking with people or reading, getting information which you put into your head.
>
> * * * If part of the information was derived by [petitioner] talking with an attorney, it seems to me that his conversations with the attorney are appropriate, cannot be shielded by the privilege * * *.

conclusion, it relied upon petitioner's counsel's own explanation of the thrust of the contemplated testimony. Pet. App. 12a-13a. Petitioner was not entitled to a blanket ruling *in limine* that testimony on the steps he took to restructure the Cluett and Hammermill transactions would not open him to cross-examination.[13]

In the final analysis, this case presents only the question whether, on the particular facts of this case, it was an abuse of discretion for the district court to withhold a ruling *in limine* that would entitle petitioner to testify to his good faith without exposing himself to cross-examination regarding the basis for that belief and information inconsistent with it. That question does not warrant this Court's review.

2. Petitioner also seeks review (Pet. 15-18) of the question whether the false statement statute, 18 U.S.C. 1001, requires a showing of materiality.

Section 1001 may be violated in three ways; it imposes specified penalties upon any person who,

---

[13] In fact, as we have noted, petitioner did testify regarding the structure of the transactions without being questioned about his communications with counsel. On direct examination, petitioner testified that he structured the Cluett deal to conceal DeBartolo's name, as well as the names of other investors, and to shield DeBartolo from lawsuits. On cross-examination, petitioner testified about the money that he raised from others to pay for his Cluett stock; he explained the profit-sharing agreements between himself and his investors (as well as his efforts to change those agreements into unsecured, interest-bearing loans); and he testified that he believed at the time of the Cluett transaction that profit-sharing agreements and secured loans needed to be disclosed on an SEC Schedule 13D, implying a belief that he was not obligated to disclose unsecured, interest-bearing loans. Gov't C.A. Br. 17-18.

> in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully [1] falsifies, conceals or covers up by any trick, scheme, or device a material fact, or [2] makes any false, fictitious or fraudulent statements or representations, or [3] makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry * * *.

Relying on the distinction between the language of the first clause (which refers to "a material fact") and the last two (which do not mention materiality), the Second Circuit has long held that materiality is not required for a conviction under the last two clauses. *E.g.*, *United States* v. *Silver*, 235 F.2d 375, 377, cert. denied, 352 U.S. 880 (1956); *United States* v. *Rinaldi*, 393 F.2d 97, 99-100 (1968); *United States* v. *Elkin*, 731 F.2d 1005, 1009, cert. denied, 469 U.S. 822 (1984). Other circuits, by contrast, have "inferred a judge-made limitation of materiality" for the false statement clause. *United States* v. *Corsino*, 812 F.2d 26, 30 (1st Cir. 1987). See cases cited at Pet. 17 n.22.

Although the circuits are in conflict on this question, the issue has no effect on this case. Each of the false statement counts charged that an SEC filing by petitioner violated both the "concealment" clause and the "false statement" clause of 18 U.S.C. 1001 in a particular respect. The district court determined —in findings not challenged on appeal—that each concealment charged was material. That finding amounted to a finding that the corresponding false statements were material as well, since the concealment and false statement charged in any given count were two sides of the same coin. For instance, one count charged that the Schedule 13D filing submitted

in connection with the Cluett transaction violated Section 1001 because petitioner "falsely claimed to have purchased * * * 581,000 shares of stock with 'personal funds'" and "unlawfully failed to disclose that he had purchased the stock with money raised from various individual investors, that he had profit-sharing agreements with his investors, and that he had guaranteed his investors against loss." C.A. App. C, ¶ 9; see *id.* ¶ 24. The district court found that the facts concealed were material for purposes of the "concealment clause"; having made that finding, the court could not logically have found that the false statement was any less material for purposes of the "false statement" clause. See *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (noting that the standard of materiality is the same in both contexts).[14]

---

[14] As this Court recognized in *Kungys* v. *United States*, 485 U.S. at 772, the issue of materiality presents a question of law for the trial court, not an issue of fact for the jury. See *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929); *United States* v. *Jones*, 933 F.2d 807, 811-812 (10th Cir. 1991); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983). Even the Ninth Circuit, which had held prior to *Kungys* that materiality under Section 1001 is a jury question, *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979), has recognized the contrary language in *Kungys*, see *United States* v. *Clark*, 918 F.2d 843, 846 (9th Cir. 1990). It may be prepared to join all the other circuits on this issue when an appropriate case presents itself. See *United States* v. *Daily*, 921 F.2d 994, 1004-1005 (10th Cir. 1990) (recognizing that *Kungys* requires conclusion that materiality is for the court, notwithstanding prior circuit precedent). Although the petition argues in passing that the Court should address this question in this case (Pet. 16-17 n.21), the issue is not encompassed by the questions presented (*id.* at i), and petitioner did not argue in the court of appeals that materiality was an issue for the jury.

Finally, the court of appeals rejected petitioner's contention that the evidence was insufficient to show that the misstatements and omissions in his SEC filings were immaterial for purposes of the fraud counts. Pet. App. 18a-23a. Although materiality for purposes of the anti-fraud provision is assessed from the point of view of the reasonable shareholder, see *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 450 (1976), rather than the government, as under Section 1001, see *Kungys* v. *United States*, 485 U.S. at 770, the distinction is inconsequential on the facts of this case. Thus, the failure of the district court to make an explicit finding of materiality with respect to the false statement clause of the Section 1001 counts could have had no effect whatever on the verdicts in this case.

3. Petitioner also contends (Pet. 18-21) that the general false statement statute, 18 U.S.C. 1001, does not apply to false SEC filings. In his view, he should have been prosecuted under Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78ff(a). See Pet. App. 60a.

By its terms, Section 1001 is fully applicable to false statements in SEC filings. Nothing in its language or legislative history supports an exemption for such statements. As the court of appeals noted, this Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979). In keeping with this principle, this Court held in *United States* v. *Gilliland*, 312 U.S. 86, 95-96 (1941), that Section 1001's predecessor was fully applicable to false affidavits that might also have been

subject to prosecution under the Hot Oil Act.[15] The courts of appeals have also consistently rejected contentions that Section 1001 is inapplicable to false statements that could be prosecuted under narrower provisions. *E.g.*, *United States* v. *Hartness*, 845 F.2d 158, 162-163 (8th Cir.), cert. denied, 488 U.S. 925 (1988); *United States* v. *Hansen*, 772 F.2d 940, 943-949 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986); *United States* v. *Grotke*, 702 F.2d 49, 54 (2d Cir. 1983); *United States* v. *Anderez*, 661 F.2d 404, 407 (5th Cir. 1981); *United States* v. *Gordon*, 548 F.2d 743, 744 (8th Cir. 1977). There is no conflict among the courts of appeals on this issue or any other reason justifying this Court's review.

4. The federal conspiracy statute, 18 U.S.C. 371, prohibits conspiracies "either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." Both of the conspiracy counts on which petitioner was convicted charged him with conspiring to commit specified offenses and to defraud the United States. C.A. App. C, ¶¶ 49, 57. Contending that those two clauses are mutually exclusive, petitioner maintains that it was improper to prosecute him for a conspiracy to defraud the United States when the evidence would have supported a conspiracy to violate a particular statute. Pet. 21-25.

---

[15] Under regulations promulgated pursuant to that Act, the defendants were required to file affidavits regarding oil production. The statute made it a misdemeanor to "knowingly violat[e] any provision of [the] Act or any regulation promulgated thereunder." Act of Feb. 22, 1935, ch. 18, § 6, 49 Stat. 32. This Court held that the possibility of prosecution under that more specific statute did not foreclose application of the general prohibition against false statements found in the predecessor of Section 1001.

This Court has rejected petitioner's interpretation of Section 371. In *Dennis* v. *United States*, 384 U.S. 855, 862-864 (1966), the defendants were convicted of conspiring to defraud the United States by filing false affidavits with the National Labor Relations Board. They argued that the case involved "a conspiracy to commit the substantive offense of filing false statements in violation of 18 U.S.C. 1001" and that their misconduct "may not properly be laid under the conspiracy-to-defraud clause of § 371." *Id.* at 862-863. This Court held that "[t]he fact that the events [charged] include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of § 371 unavailable to the prosecution." *Id.* at 863-864. Recently, the Court reaffirmed that the defraud clause "reaches *any* conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government." *Tanner* v. *United States*, 483 U.S. 107, 128 (1987) (internal quotation marks omitted; emphasis added).

The fact that the two clauses in Section 371 are separated by the word "or" does not suggest that they are mutually exclusive.[16] There is no good reason, moreover, to attribute to Congress an intent to permit a defendant who has conspired to defraud the United States to avoid conviction by showing that the objects of the conspiracy also included one or more specific criminal offenses.

Nevertheless, in *United States* v. *Minarik*, 875 F.2d 1186 (1989), the Sixth Circuit reversed convictions under the defraud clause on the ground that the pros-

---

[16] Under a statute that prohibited speeding "or" driving recklessly, the second clause could not fairly be read as limited to those reckless drivers who obey the speed limit.

ecution should have been brought under the offense clause. Although the court's opinion is wide-ranging and twice suggests categorically that the defraud clause and the offense clause are mutually exclusive, *id.* at 1187, 1194, the court's actual holding in *Minarik* was very narrow (*id.* at 1196):

> [W]here the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause. The conspiracy is still an indictable offense under the first clause of § 371. But compliance with our rule today will mean that prosecutors and courts are required to determine and acknowledge exactly what the alleged crime *is*.

In addition, the court placed great emphasis on confusion that it found in the government's theory of the case and identified a number of "limits of [its] holding." *Id.* at 1189-1190, 1195.[17]

In our view, *Minarik* was wrongly decided. It finds no support in the language of the statute; it conflicts with *Dennis* and *Tanner*; and its interpretation of the conspiracy statute is inadministrable in practice. But this case is not an appropriate one for the Court to address the correctness of *Minarik*. Petitioner's offenses do not fall within the scope of *Minarik*'s holding, since petitioner was not preju-

---

[17] Both the court of appeals in the instant case and the Seventh Circuit have noted the limits on *Minarik*'s holding. Pet. App. 28a-29a; *United States* v. *Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991).

diced in his trial preparation or at trial by any confusion in the prosecution's theory of the case, and since there is no reason to characterize petitioner's offenses as "technical" or "difficult to discern." Moreover, petitioner would derive no benefit even from the broadest possible reading of that case.

The defendants in *Minarik* were charged only with conspiring to defraud the United States by engaging in conduct that arguably violated a single specific statute. By contrast, the indictment here alleged that petitioner was a member of broader conspiracies encompassing violations of numerous statutes and rules, as well as conduct (parking and accumulating shares) that is not in and of itself made criminal by any statute. Each count charged a conspiracy whose objects were both to commit specific offenses and to defraud the United States. If (as *Minarik* suggests) the two clauses are mutually exclusive, petitioner would have been entitled at most to an instruction that the jury should first consider whether his conspiracy violated the offense clause of Section 371 and should take up the defraud clause only if there was insufficient evidence to support a conviction of conspiring to commit a specific offense. Petitioner would not have been entitled to an acquittal, however, unless the jury found that he did not conspire either to commit a specific offense or to defraud the United States. The jury's guilty verdicts in this case establish that his conspiracy encompassed at least one of the objects forbidden by Section 371.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SIDNEY M. GLAZER
Attorney

AUGUST 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 45007

(3)

No. 90-1803

FILED
AUG 20 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PAUL A. BILZERIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER

ARTHUR F. MATHEWS *
STEPHEN H. SACHS
LOUIS R. COHEN
JOSEPH K. BRENNER
W. HARDY CALLCOTT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Petitioner
* Counsel of Record

August 20, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES

	Page
Admiral Insurance Co. v. United States District Court, 881 F.2d 1486 (9th Cir. 1989)	2
Allstate Insurance Co. v. James, 845 F.2d 315 (11th Cir. 1988)	5
Boyde v. California, 110 S. Ct. 1190 (1990)	6
Cheek v. United States, 111 S. Ct. 604 (1991)	2
Hunt v. Blackburn, 128 U.S. 464 (1888)	3
Lorenz v. Valley Forge Insurance Co., 815 F.2d 1095 (7th Cir. 1987)	3
Luce v. United States, 469 U.S. 38 (1984)	5
Mills v. Maryland, 486 U.S. 367 (1988)	6
Olender v. United States, 210 F.2d 795 (9th Cir. 1954)	2
Parker v. Prudential Insurance Co., 900 F.2d 772 (4th Cir. 1990)	3, 5
Pulliam v. Allen, 466 U.S. 522 (1984)	6
Street v. New York, 394 U.S. 576 (1969)	6
United States v. Clark, 918 F.2d 843 (9th Cir. 1990)	5
United States v. Dwyer, 843 F.2d 60 (1st Cir. 1988)	2
United States v. Eisenstein, 731 F.2d 1540 (11th Cir. 1984)	2
United States v. Gibson, 881 F.2d 318 (6th Cir. 1989)	6
United States v. Matias, 836 F.2d 744 (2d Cir. 1988)	2
United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989)	6, 7
United States v. Nobles, 422 U.S. 225 (1975)	5
United States v. Pryce, No. 89-3124 (D.C. Cir. July 16, 1991)	5
United States v. St. Clair, 855 F.2d 518 (8th Cir. 1988)	2
United States v. White, 887 F.2d 267 (D.C. Cir. 1989)	3, 4
United States v. Woodall, 438 F.2d 1317 (5th Cir. 1970), *cert. denied*, 403 U.S. 933 (1971)	3
Upjohn Co. v. United States, 449 U.S. 383 (1981)	2
Wylie v. Marley Co., 891 F.2d 1463 (10th Cir. 1989)	5

TABLE OF AUTHORITIES—Continued

RULES Page

S. Ct. R. 14.1(a) 6
Proposed Fed. R. Evid. 513(b) 5

OTHER AUTHORITIES

E. Cleary, *McCormick on Evidence* (3d ed. 1984).. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1803

PAUL A. BILZERIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONER

Petitioner Paul A. Bilzerian respectfully submits this reply brief in support of his petition for a writ of certiorari.

1. Petitioner was charged with specific intent crimes. Because of the ruling below on the attorney-client privilege issue, petitioner was unable to assert his good faith in response to those charges without waiving his privilege as to confidential attorney-client communications. That important error is worthy of the Court's review, and none of the government's arguments answers our showing on this point.

a. The issue is undeniably important. This Court recently affirmed that a defendant's testimony that he acted in good faith (even if objectively unreasonable) is, if the jury believes it, a complete defense against a charge of

willful violation of the law. *Cheek v. United States*, 111 S. Ct. 604, 610-11 (1991). By conditioning the assertion of such testimony on waiver of the attorney-client privilege, the rule announced below would effectively prevent defendants from testifying as to good faith in the large majority of cases in areas (such as securities regulation) where defendants "constantly go to lawyers to find out how to obey the law." *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).[1]

b. The government appears to be making the extraordinary argument (Opp. at 15-18) that a defendant's testimony waives his attorney-client privilege as to any attorney-client communication that might be *relevant* to that testimony. But relevance has never been and cannot be the test for waiver of the attorney-client privilege. The privilege has always protected attorney-client communications precisely because they have "sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice." E. Cleary, *McCormick on Evidence* § 72 (3d ed. 1984).[2]

---

[1] The government's assertion—made without any supporting argument or authority (Opp. at 2 n.1)—that reversal on the attorney-client privilege issue would not result in a reversal of all counts of the conviction is wrong. The trial court's error prevented petitioner from exercising his fundamental right to tell the jury that he did not intend to violate the law, *see Cheek*, 111 S. Ct. at 611, and to explain the crucial changes he made in his tender offers in an attempt to comply with the law. By preventing petitioner from responding to the government's key allegations, the rulings devastated both the substance of his defense and his credibility as a witness. Trial errors affecting the credibility of the defendant are particularly likely to be harmful, *see United States v. St. Clair*, 855 F.2d 518, 523 (8th Cir. 1988); *United States v. Dwyer*, 843 F.2d 60, 64 (1st Cir. 1988); *United States v. Matias*, 836 F.2d 744, 749-50 (2d Cir. 1988); *United States v. Eisenstein*, 731 F.2d 1540, 1546 (11th Cir. 1984), and demand reversal on all counts even if they directly affect testimony only on some counts. *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954).

[2] *See Upjohn*, 449 U.S. at 396 (considerations of relevance "do not overcome the policies served by the attorney-client privilege"); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494

A holding that relevance is the test for waiver of the attorney-client privilege would eviscerate the privilege.

The government relies on cases concerning the privilege against self-incrimination (Opp. at 15), but that is a privilege not to testify, and by taking the stand the defendant obviously waives his general right not to give relevant testimony against himself. Settled law holds that the attorney-client privilege is waived only by putting a privileged *communication* in issue, either by revealing its substance in part or relying on its existence as a defense.[3] Petitioner sought to do neither.

The government (Opp. at 18) attempts to distinguish *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989), on the ground that White sought only to deny criminal intent, while petitioner sought affirmatively to assert good faith. That is a distinction without any difference. As this Court recognized in *Cheek*, 111 S. Ct. at 611, if the

---

(9th Cir. 1989) (existence of attorney-client privilege does not depend on balancing of privilege against other factors such as relevance).

[3] Pet. at 9-10. The attorney-client privilege cases cited by the government (Opp. at 16 n.8) all involved situations where the holder of the privilege affirmatively put the privileged communication in issue, for instance by asserting defective advice from counsel, *United States v. Woodall*, 438 F.2d 1317 (5th Cir. 1970) (en banc), *cert. denied*, 403 U.S. 933 (1971), or asserting reliance on advice of counsel, *Hunt v. Blackburn*, 128 U.S. 464 (1888). Here, the proffered testimony would not have referred to the existence or contents of any communications with counsel, and petitioner offered to stipulate that he was not asserting an advice of counsel defense (Pet. at 5). Petitioner sought only to deny the government's allegation that he had *willfully* violated the law.

As the government concedes (Opp. at 7), the jury knew that petitioner had consulted with counsel *only* because the government itself had introduced that evidence during its case-in-chief. The introduction of evidence by one party cannot force the waiver of the opposing party's attorney-client privilege. *See Parker v. Prudential Ins. Co.*, 900 F.2d 772, 776 n.3 (4th Cir. 1990); *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987).

jury believes a defendant's claim of good faith, then the government has not carried its burden of proving criminal intent. The jury in this case was so instructed. *See* Tr. at 3373 ("The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt").[4] The decision below—which prevented petitioner from offering evidence on this crucial issue—is contrary to logic, contrary to precedent, and worthy of review.

c. The weakness of the government's argument on the privilege issue is illustrated by its primary reliance on Judge Lombard's concurring argument, *not* adopted by the panel majority, that the issue was not properly preserved for post-trial review (Opp. at 13-15). By contrast, the district judge addressed the privilege issue on the merits in his denial of petitioner's motion for new trial (App. at 37a-39a),[5] as did the panel majority on appeal (App. at 8a-13a).[6] Although the government misleadingly cites certain of the trial judge's remarks during preliminary discussions of the issue (Opp. at 8-10), the record is clear that at the end of each argument concerning the privilege, the court made a definitive, final ruling that petitioner's proposed testimony would constitute waiver (*e.g.*, Tr. 2422, 2443-45, 2947-49).

---

[4] Moreover, nothing in the *White* opinion turns on the defendant's failure to take the stand. Rather, *White* turns on the fact that the defendant—exactly like petitioner here—"refrained from relying on any statements of counsel and expressly disavowed any intent to rely on an advice-of-counsel defense." 887 F.2d at 270.

[5] The district judge also stated repeatedly during trial that the privilege issue had been properly preserved for appellate review (Tr. 2352, 2732).

[6] The majority (App. at 11a) noted, in its attempt to distinguish *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989), that petitioner had not ultimately testified concerning the privilege communications, but the majority never suggested that the issue had not been properly preserved for review.

Many courts, including this Court, have reviewed similar *in limine* rulings concerning the application of a privilege.[7] This Court's Proposed Federal Rule of Evidence 513(b) said that privilege issues *should* be raised *in limine*. Judge Lombard's position would require a party to waive the attorney-client privilege, and lose forever the confidentiality of the protected communication, in order to preserve the issue for appeal. That result would wholly distort this Court's ruling in *Luce v. United States*, 469 U.S. 38 (1984).[8]

2. The government concedes that "the circuits are in conflict" (Opp. at 21) on whether materiality is an essential element of the Section 1001 false statement offense. In nonetheless arguing against review by this Court, the government erroneously claims that the issue "has no effect on this case" (Opp. at 21); the government bases this claim on post-hoc speculation about what *might* have happened below *if* the trial court had considered whether the alleged false statements were material. But it is undisputed (Opp. at 23) that the court did not consider that question.[9] Accordingly, if this Court were to hold

---

[7] *See, e.g., United States v. Nobles*, 422 U.S. 225, 241 (1975); *Parker v. Prudential Ins. Co.*, 900 F.2d 772, 775 (4th Cir. 1990); *Wylie v. Marley Co.*, 891 F.2d 1463, 1470-71 (10th Cir. 1989); *Allstate Ins. Co. v. James*, 845 F.2d 315, 320 (11th Cir. 1988).

[8] There are other important reasons why the rationale of *Luce* does not apply here. Petitioner raised the privilege issue in this case during trial, at a point when the trial judge was intimately familiar with the record, not before trial as in *Luce*. The D.C. Circuit recently declined to apply *Luce* in similar circumstances, holding that the specter of the pretrial "planting" of reversible error—which drove the decision in *Luce* and is argued by the government here—is "farfetched" in the context of a mid-trial motion *in limine*. *United States v. Pryce*, No. 89-3124, slip op. at 7-8 (D.C. Cir. July 16, 1991).

[9] Moreover, as petitioner contends and the Ninth Circuit has held, the question of materiality is for the jury, not the trial court. *See United States v. Clark*, 918 F.2d 843, 846 (9th Cir. 1990). And contrary to the government's passing suggestion (Opp. at 22 n.14),

that a finding of materiality is required, petitioner's Section 1001 convictions would have to be overturned.[10]

3. The government (Opp. at 23-24) does not answer the central point made by Judge Winter's dissent below. Judge Winter did not dispute the general maxim (relied on by the government) that criminal statutes, including Section 1001, can overlap. But he correctly reasoned that whether the government can prosecute under Section 1001, instead of a specific criminal statute such as Section 32(a) of the 1934 Act, is purely a question of congressional intent. Given the protections Congress carefully provided for defendants under the 1934 Act, it makes no sense to argue that Congress, without discussion, intended to remove all those protections only twelve days later when it enacted Section 1001 (App. at 35a-36a). The government's attempt to circumvent the strict proof requirements of Section 32(a) is contrary to congressional intent and worthy of this Court's review.

4. The government concedes (Opp. at 26) that the doctrine announced by the Sixth Circuit in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), but rejected by the Second Circuit below, merits review The government tries to argue (Opp. at 26-27) that petitioner's conviction would not be affected by adoption of the Sixth Circuit rule. But in so doing the government wrongly characterizes the *Minarik* doctrine as it is understood by the Sixth Circuit itself. In *United States v. Gibson*, 881 F.2d 318, 320 n.1 (6th Cir. 1989), the court stated that: "We recently held that 'conspiracies to commit specific offenses

---

whether materiality must be decided by the court or the jury is "fairly included" within the questions presented to this Court. *See* S. Ct. R. 14.1(a); *Pulliam v. Allen*, 466 U.S. 522, 528 & n.5 (1984).

[10] *See, e.g., Boyde v. California*, 110 S. Ct. 1190, 1197-98 (1990) (where jury's general verdict may have rested on impermissible ground, conviction must be set aside); *Mills v. Maryland*, 486 U.S. 367, 376 (1988) (same); *Street v. New York*, 394 U.S. 576, 586-87 (1969) (same for trial court's general verdict).

(which are also arguably general frauds)' must be prosecuted 'exclusively under the offense clause of § 371. . . . [quoting *Minarik*].'" Here, petitioner was charged with conspiracy to commit specific offenses but was *not* charged exclusively under the offense clause of Section 371. The decision below squarely conflicts with the decisions of the Sixth Circuit on an issue that the government concedes warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR F. MATHEWS *
STEPHEN H. SACHS
LOUIS R. COHEN
JOSEPH K. BRENNER
W. HARDY CALLCOTT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Petitioner

Dated: August 20, 1991

* Counsel of Record